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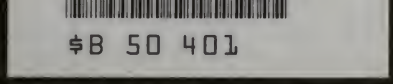

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The Introductory Articles of the Constitution of Illinois

BY

HERMAN G. JAMES, A.M., J.D.,

MEMBER OF THE ILLINOIS BAR

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1911

THE INTRODUCTORY ARTICLES OF THE CONSTITUTION OF ILLINOIS

BY

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SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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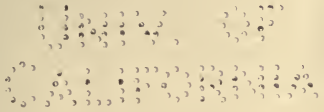

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PREAMBLE.[1]

A study of the preamble of a constitution may often prove interesting and instructive to the student of constitutional history, even though its practical value to a lawyer may be comparatively slight. It has, indeed, been asserted that a preamble is, strictly speaking, without force in a legislative sense, being but a guide to and not the vehicle of the import of a statute.[2] Other writers, however, have awarded to the preamble of a constitution or a statute a larger measure of importance,[3] and the decisions of our federal supreme court contain a number of expressions of opinion on the meaning of the preamble to the federal constitution [4] which have unquestionably been of great significance in the development of the powers conceded by that tribunal to the federal government under the constitution. Nor can it make any material difference, for our purposes, whether the first paragraph of the constitution of Illinois should be termed an enacting clause rather than a preamble, as has been as-

[1] "We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which he hath so long permitted us to enjoy and looking to Him for a blessing upon our endeavours to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the State of Illinois."—*Constitution of Illinois, 1870, Preamble.*

[2] Lieber, "Hermeneutics," p. 117 n.

[3] Story on the Constitution (4th ed.), p. 338; Kent's "Commentaries," Lecture xx, p. 460 ff.

[4] Chisholm *v.* Georgia, 2 Dallas, 419; Martin *v.* Hunter, 1 Wheaton, 305; McCullock *v.* Maryland, 12 Wheaton, 316.

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serted of the almost identical preamble to the federal constitution,[1] or whether it partakes of the nature of both of these forms, for we are here concerned primarily with the origin and development of the first paragraph in the constitution, expressly termed by the framers, whether rightly or wrongly, a preamble.

A considerable part of the preamble to the present constitution of Illinois is directly traceable to the first constitution of the state, adopted in 1818, the opening paragraph of which contains the following language: "The People of Illinois Territory etc. . . . in order to establish justice, promote the welfare and secure the blessings of liberty to themselves and their posterity do . . . ordain and establish the following constitution or form of government."[2] It is seen that all of these clauses have become, with some minor alterations, part of the preamble to the present constitution.

At the time when the first Illinois constitution was framed it was already the general practice in the other states of the Union to prefix preambles to their constitutions, for, of the eighteen states which had adopted constitutions before 1818,[3] all but three, Georgia, 1798; New Hampshire, 1792; and Vermont, 1793, had inserted a clause in the nature of a preamble, as had also the federal constitution of 1787. Of these sixteen, however, apparently only the Indiana constitution of 1816, the Ohio constitution of 1802, and the federal constitution of 1787 could have served as models for the Illinois constitution in this respect as they contain almost

[1] Andrews, "Manual of the Constitution," p. 44.

[2] Debates and Proceedings of the Constitutional Convention of 1869, p. 1889.

[3] Delaware, 1792; Georgia, 1798; Indiana, 1816; Kentucky, 1792; Louisiana, 1812; Maryland, 1776; Massachusetts, 1780; Mississippi, 1817; New Hampshire, 1792; New Jersey, 1776; New York, 1777; North Carolina, 1776; Ohio, 1802; Pennsylvania, 1790; South Carolina, 1790; Tennessee, 1796; Vermont, 1793; Virginia, 1776. Thorpe, "American Charters, Constitutions and Organic Laws."

the identical phraseology, while the first three clauses are to be found in none of the other preambles of that time.

In all probability the direct prototype of the Illinois preamble of 1818 was that of the Indiana constitution of 1816; for the wording is identical in the two, save that in the Illinois constitution the third person is used instead of the first person, which latter form was indeed adopted in the original committee draft of the constitution of Illinois, though subsequently changed by amendment.[1] The constitution of Indiana having been adopted less than two years before the constitutional convention met in Illinois, and being furthermore the fundamental law of a neighboring state, closely related in every way, it was naturally the instrument to which the framers of the Illinois constitution directly looked for suggestions and guidance, even as Indiana had in turn borrowed largely from her elder sister state, Ohio, all three states having in close succession been carved out of the original Northwest Territory. As regards the wording of the preamble there is no doubt that the federal constitution was the ultimate original instrument of which the above three state constitution preambles were copies.

A determined but unsuccessful effort was made to have embodied in the preamble to the constitution of 1818 a recognition of the Deity and of Christ. Ford, in his "History of Illinois" says, "during the sitting of the convention of 1818, the Rev. Mr. Wiley and his congregation of a sect called Covenanters, in Randolph County, sent in their petition, asking that body to declare in the constitution about to be made that Jesus Christ was the head of the government and that the Holy Scriptures were the only rule of faith and practice. It does not appear," he goes on to say, "by the journals of the convention that this petition was

[1] Journal of the Constitutional Convention of 1818, pp. 16, 42.

treated with any attention, wherefore the Covenanters never yet[1] fully recognized the state government. They have looked upon it as 'an heathen and unbaptized government which denies Christ'; for which reason they have constantly refused to work the roads under the laws, serve on juries, hold any office or do any other act showing that they recognize the government. For a long time they refused to vote at the elections; and never did vote until the election in 1824 when the question was whether Illinois should be made a slave state, when they voted for the first time and unanimously against slavery." The actual wording of these petitions, of which there were three in all, as shown by the journal of the convention of 1818 was slightly different, though substantially as stated by Ford.[2] Two of them were referred to a select committee which was later discharged from the further consideration thereof, and the other, presented four days before adjournment of the convention in Angust was on motion of Mr. Cullom laid on the table "until the fourth day of March next."[3] This agitation though unsuccessful at that time had its effect on the consideration of the same general question thirty years later when the second constitution of Illinois was being framed.

Coming now to the constitution of 1848 we find several changes in the form of the preamble from that of the constitution of 1818, which changes were also embodied in the preamble to our present constitution. A distinct paragraph was made of the preamble, some of the clauses in the first constitution were slightly altered to conform to the style adopted by the majority of constitutions in force at that time, and four new phrases were added. Three of these viz. (in order to) (a) "form a more perfect government," (b) "insure domestic

[1] 1854.

[2] Journal of the Constitutional Convention of 1818, pp. 13, 66.

[3] *Ibid.*, p. 66.

tranquility," (c) "provide for the common defense," were evidently taken verbatim from the federal constitution, for they were to be found in no other state constitutions in 1847, except the last clause which was found in the Alabama constitution of 1819.[1]

The fourth addition, and the most important of the changes, was the present clause referring to the Deity. It has been seen how the failure of the convention of 1818 to embody any mention of the Deity in the constitution of that year was the cause of violent opposition by the Convenanters. Yet the report of the committee on law reform in the convention of 1847 contained a preamble in which again no reference was made to the Deity,[2] although by this time nine state constitutions had been adopted with some such clause in the preamble.[3] The preamble was, however, amended by the addition of the present clause containing an expression of thanks and an invocation,[4] written by Judge Lockwood,[5] and modeled almost exactly on the corresponding clause in the constitution of New Jersey adopted three years before.

That the preamble as finally adopted in the constitution of 1848 met with approval, or at least with no strong opposition, is evidenced by the fact that it was incorporated without the slightest change both into the proposed constitution of 1862 and into the present constitution adopted in 1870. The convention of 1862 adopted the former preamble with-

[1] *Cf.* Alabama, 1819, "insure tranquility," and Maine, 1819, "provide for our mutual defense." *Cf.* also the Constitution of the Republic of Texas, 1836.

[2] Journal of the Convention of 1847, p. 395.

[3] Connecticut 1818, Delaware 1831, Iowa 1846, Maine 1819, Massachusetts 1780, New Jersey 1844, New York 1846, Rhode Island 1842, Texas 1845; Thorpe, "American Charters, Constitutions and Organic Laws."

[4] Journal of the Convention of 1847, p. 511.

[5] Orville Berry, "The Constitutions of Illinois." Illinois Blue Book, 1907, p. 522.

out discussion, but in the convention of 1870 the preamble was again the subject of various motions, resolutions and petitions especially with respect to the recognition of the Deity, before being finally adopted in its entirety from the existing constitution. One resolution called for a recognition of Jesus Christ in addition to recognizing Almighty God,[1] and was supported by a petition to that effect from divers citizens of Washington County.[2] Another resolution again proposed a preamble omitting all reference to the Supreme Being,[3] while the committee on the bill of rights reported a preamble containing a recognition of both Jesus Christ and Almighty God.[4] A Mr. Goodell, impressed with the dignity of the body of which he was a member, offerred the following: "Resolved that the Committee on the Bill of Rights be requested to inquire into the expediency of prefixing the word 'Almighty' to 'God,' as proposed in the preamble reported to this Convention by the committee, as said phrase clearly implies and asserts that the sovereignty exists elsewhere than in this Convention."[5]

These various resolutions and reports evoked considerable debate[6] all terminating, however, in a substitute motion to adopt the preamble to the existing constitution (1848) in lieu of all pending propositions, which was adopted by the convention.[7]

That this demand for an express recognition of the Supreme

[1] Journal of the Constitutional Convention of 1869, p. 96.

[2] Debates and Proceedings of the Constitutional Convention of 1869, p. 479.

[3] Journal of the Constitutional Convention of 1869, p. 179.

[4] *Ibid.*, p. 207. [5] *Ibid.*, p. 238.

[6] Debates and Proceedings of the Constitutional Convention of 1869, pp. 231–235, 276–278. *Cf.* also Illinois State Journal, January 28, 1870, for a communication on the subject of recognizing Christ in the constitution.

[7] Journal of the Constitutional Convention of 1869, p. 242. *Cf.* Illinois State Journal, January 25, 1870, for editorial comment on the proposed preambles.

Being in the fundamental law of the state was not an isolated phenomenon in Illinois, but merely one manifestation of a general growing conviction among the people of the United States as a whole in favor of such a recognition, appears firstly from the fact that whereas in 1818 of the eighteen constitutions then in force, only two, viz. Delaware 1792 and Massachusetts, 1780, contained a direct recognition of the Supreme Being, other than the references in the requirements of oaths of office and the provision protecting religious freedom found in all the constitutions, by 1848 when such a clause was inserted into the constitution of Illinois for the first time, nine of the twenty-eight state constitutions then in force contained such a clause in the preamble, two of the sixteen states without it in 1818 having embodied it in subsequent constitutions, viz. New Jersey, 1844, and New York, 1846. At the present time, moreover, forty-one of the forty-six state constitutions contain a clause similar to that in the Illinois constitution, and of the remaining five, viz. New Hampshire, 1792, Oregon, 1857, Tennessee, 1870, Vermont, 1793, and West Virginia, 1872, those of New Hampshire and Vermont are still the constitutions of the earliest period when, as has been seen, only three states contained a clause of that nature.[1]

It is an interesting fact that in the last constitutional convention for Michigan in 1908 no suggestion had been made to insert a clause in recognition of the Deity—there having been no such clause in either of the two prior constitutions of that state—until a resolution was presented on the floor of the convention from a Free-thinkers Society in Detroit protesting against any attempt to insert such a clause. Very soon thereafter such a clause was reported, and adopted without discussion. The federal constitution, moreover, still dating from that early period and having no reference to the

[1] See *ante*, p. 4.

Deity, has been subjected to considerable criticism on that account, which culminated in 1863 and 1864 during the dark days of the Civil War in three religious conventions, one held at Xenia, Ohio, February 3, 1863, one at Sparta, Illinois three days later and the third in Allegheny City, Pennsylvania, January 27, 1864 all advocating an amendment to the constitution so as to include an acknowledgment of the Deity in the preamble.[1]

In conclusion it may be added that at the present time all but three state constitutions, viz. New Hampshire, 1792; Vermont, 1793; and West Virginia, 1872 contain clauses in the nature of a preamble, though not expressly so designated in them all. These preambles are as a rule similar to that of the constitution of Illinois, though with a few exceptions somewhat shorter. Nevertheless they display in this respect marked differences, ranging from a full-page introduction in the constitution of Tennessee, 1870, and an extended philosophical disquisition on the nature of government, in that of Massachusetts, 1780, on the one hand, to the concise two and three line preambles in the constitutions of North Dakota, 1889, and Oregon, 1857, on the other. Of the two general subjects in the preamble of the Illinois constitution, viz. the reference to the Deity and the declaration of the purposes of the constitution, the former is dealt with also in all but two of the other state constitutions containing preambles, viz. Oregon, 1857, and Tennessee, 1870, while the latter is included in more than one-half of the present preambles.

From the above considerations, therefore, it is seen that whatever the legal import or practical significance of the preamble to a constitution may be, it has for a century and a quarter had a recognized place in the form of our American constitutions from the earliest constitutions of 1776 to the most recent ones of 1907 and 1908.

[1] Cornelison, "Religion and Civil Government in the United States," p. 230 ff.

ARTICLE I.

BOUNDARIES.[1]

The first public act of any subsequent significance, dealing with the title and jurisdiction to any part of the territory now comprised within the state of Illinois, was the Virginia Charter of 1609. By this Charter James I granted to the London Company, incorporated in 1609, two hundred miles to the north and two hundred miles to the south of Old Point Comfort, along the coast, and "all that space and circuit of land lying from the sea-coast of the precinct aforesaid, up into the land throughout, from sea to sea, west and northwest."[2] Upon this charter, annulled in 1624 by quo warranto proceedings, Virginia later partly based her claim to the lands lying northwest of the Ohio, including the present state of Illinois. This charter was followed in 1620 by the Charter of New England, by which James I granted to the reorganized Plymouth Company of 1606 all the land lying

[1] "The boundaries and jurisdiction of the state shall be as follows, to wit: Beginning at the mouth of the Wabash River; thence up the same, and with the line of Indiana to the northwest corner of said state; thence east with the line of the same state, to the middle of Lake Michigan; thence north along the middle of said lake to north latitude forty-two degrees and thirty minutes, thence west to the middle of the Mississippi River, and thence down along the middle of that river to its confluence with the Ohio River, and thence up the latter river along its northwestern shore to the place of its beginning; *Provided*, That this state shall exercise such jurisdiction upon the Ohio River as she is now entitled to or such as may hereafter be agreed upon by this state and the state of Kentucky." —*Constitution of Illinois, 1870, Boundaries.*

[2] Second Charter of Virginia, 1609; Thorpe, "American Charters, Constitutions and Organic Laws," vol. vii, p. 3790.

and being in breadth from 40° north latitude to 48° and "in length by all the breadth aforesaid throughout the main land from sea to sea,"[1] which grant therefore, covered all that part of the present state of Illinois, situated north of an east and west line about fifteen miles north of Springfield; that is to say, it included the entire northern half of the present state.

The Council of New England then granted in 1628 to a company composed of Endicott and five named associates all that part of New England between three miles north of the Merrimac River and three miles south of the southermost point of Massachusetts Bay or of the Charles River, "in length and longitude of and within all the breadth aforesaid, throughout the main lands there, from the Atlantic and Western Sea, and Ocean on the east part to the South Sea on the west part."[2] This grant, therefore, did not extend as far south as the lands of the New England Council extended and covered only about the northern one-tenth of the present state *i. e.*, north of lat. n. 42° 2′ which is practically the line of the present northern city limits of Chicago. This grant was confirmed by Charles I in the following year[3] and became the basis of the Massachusetts claims to western lands insisted upon in 1779, this charter having been annulled by quo warranto proceedings in 1684 and a new charter granted in 1691[4] conveying land to the westward as far as the colonies of Connecticut extended in that direction.

This last colony held under a sea-to-sea charter by Charles II. in 1662 granting to John Winthrop and associates all lands west of Narragansett Bay, and south of the Massachusetts

[1] The Charter of New England. Thorpe, vol. iii, p. 1827.

[2] *Cf.* Charter of Massachusetts Bay, 1629; Thorpe, "American Charters, etc.," vol. iii, p. 1847.

[3] Charter of Massachusetts Bay, 1629; *Ibid.*, p. 1846.

[4] Charter of Massachusetts Bay, 1691; *Ibid.*, p. 1870.

line and between it and the sea and "in longitude as the line of the Massachusetts colony running from east to west, that is to say from the said Narragansett Bay on the east to the South Sea on the west part."[1] It was this charter, never annulled by judicial proceedings and not even physically surrendered upon demand of Sir Edward Andros in 1687 which supported the claim of Connecticut to that part of what is now Illinois situated between lat. n. 41°, which runs a few miles south of Kankakee, and the southern boundary of the Massachusetts claim at 42° 2′.

Such then, were the public acts up to the year 1663, purporting to affect the title to lands now part of the state of Illinois. It was not, however, until ten years later that the first white man is known to have set foot within the present territory of Illinois, and the ones thus to claim this country by right of discovery were not Englishmen, but two Frenchmen, the one, Father Marquette the Jesuit missionary, the other, Louis Joliet representing the French government at Quebec. These two men in 1673 descended the Wisconsin River to the Mississippi which they followed down to the mouth of the Arkansas and ascending on their way back the Illinois River to its upper waters, crossed over to Lake Michigan at Chicago. From that time on, the Illinois country was entered by a number of French traders and explorers, chief among whom was the famous La Salle. About the year 1700 the French villages of Kaskaskia and Cahokia on the Mississippi River were settled and French colonization slowly continued until the treaty of 1763.[2] For almost a century, therefore, after Marquette's voyage the French had by occupation substantiated their claim to title and jurisdiction by the right of discovery.

Then at the close of the French and Indian War, the king

[1] Charter of Connecticut, 1662. Thorpe, vol. i, p. 529.

[2] Greene, "The Government of Illinois," pp. 7 *et seq.*

of France was by the Treaty of Paris of 1763 obliged to surrender to Great Britain everything that he possessed on the left side of the Mississippi River, except the town of New Orleans; and the confines of the dominions of Great Britain were fixed by a line drawn along the middle of the Mississippi River from its source to the River Iberville.[1] By this treaty, therefore, the first international act involving the title to land within the present state of Illinois, there was fixed a boundary line a part of which has remained the western boundary to the territory now included within Illinois from that time down to the present.

Following this treaty, and in the same year there was issued a proclamation by George III providing that no colonists should settle west of the watershed for the Atlantic Ocean;[2] all the valley from the Great Lakes to West Florida and from the Alleghenies to the Mississippi being thereby set apart for the Indians. In 1778 title and jurisdiction to the region now partly included in the state of Illinois was again claimed by Virginia as a result of the conquests by George Rogers Clark, who in July of that year under a commission from Governor Patrick Henry of Virginia captured the settlements of Kaskaskia, Cahokia, and several other posts in the name of that commonwealth.[3] Then by the act of Dec. 9, 1778 Virginia organized the county of Illinois,[4] comprising all the country north and west of the Ohio River claimed under the charter of Virginia of 1609.[5]

[1] Treaty of Paris, 1763. Gentleman's Magazine, xxxiii, p. 121. The Iberville, now called Manshac Bayou, is an outlet of the Mississippi some fifteen miles below Baton Rouge, connecting the Mississippi on the west with the Amite River on the east. See Thwaite's "Early Western Travels," vol. viii, p. 338; also Index.

[2] Annual Register, 1763, pp. 208–213.

[3] Hildreth, "History of the United States," vol. iii, p. 260.

[4] Illinois Historical Collections, Virginia Series, vol. i, p. 9.

[5] See *supra*, p. 11.

The last years of the Revolution saw the territory comprised within the present state of Illinois, claimed in whole or in part by as many as five different governments. England had of course not yet surrendered the title and jurisdiction acquired by her from France through the treaty of Paris. Virginia, as has been seen, claimed the whole of the country northwest of the Ohio upon the double basis of her first charter, and by subsequent conquest, while Massachusetts and Connecticut asserted claims based on their early charters. New York insisted on her right to the Ohio valley under a treaty with the Iroquois Indians who had asserted jurisdiction over it, while the non-claimant states contended that the lands should belong to the United States as a whole and be at the disposal of Congress for carrying on the war. Maryland especially denied the claims of the four states to lands in the west and absolutely refused to ratify the Articles of Confederation except on condition that the claimant states cede their claims to Congress.[1] Inasmuch as the refusal of Maryland to ratify the Articles of Confederation on any other basis threatened to defeat the accomplishment of the plan, Congress on Sept. 6, 1780 requested a liberal cession to the United States of a portion of the claims of the several states to waste lands in the western country, refusing at the same time to go into the question of the validity of the various claims asserted.[2]

The first state to act on this request was New York when in 1780 she authorized her delegates in Congress to cede to the United States her claims to the western lands. This was done by deed in March, 1781,[3] accepted by Congress in October, 1782,[4] granting all the claim to lands west of a meridian line drawn through the most westerly point of Lake Ontario. Though the claims of New York probably

[1] Journals of Congress, vol. v, p. 160.
[2] *Ibid.*, vol. vi, p. 123.
[3] *Ibid.*, vol. vii, p. 36.
[4] *Ibid.*, p. 373.

did not actually extend to any part of what is now Illinois, her ready cession paved the way for similar action by the other states which did lay claim to some or all of the present state. This movement was, furthermore, hastened by the promise of Congress to erect the lands ceded into distinct republican states, and in January, 1781 Virginia surrendered her claim to the country northwest of the Ohio river.[1] In 1783 she authorized the giving of a deed, on certain conditions,[2] which was done in March, 1784. Meanwhile, by the Treaty of Peace in 1783, England had been obliged to surrender her title to the western lands, thus giving the free and undisputed ownership to all of the present state of Illinois south of the Connecticut claim to the United States. In April, 1785 Massachusetts through her delegates in Congress ceded her claims to western lands to the United States,[3] followed in September, 1786 by a similar cession on the part of Connecticut,[4] removing thereby the last of the adverse claims to the country northwest of the Ohio.

The year 1787 witnessed the passage of the famous Northwest Ordinance, the first law of the new government to deal with the political division of the newly acquired territory. Article V of the Ordinance provided for the formation in the territory, northwest of the Ohio, of not less than three nor more than five states. The boundaries to the western-most state, if three were to be formed, should—subject to approval by Virginia whose deed of cession had been conditioned on a different division[5]—be as follows, the rivers Mississippi, Ohio and Wabash, a direct line drawn from the Wabash and Post Vincennes due north to the territorial line between

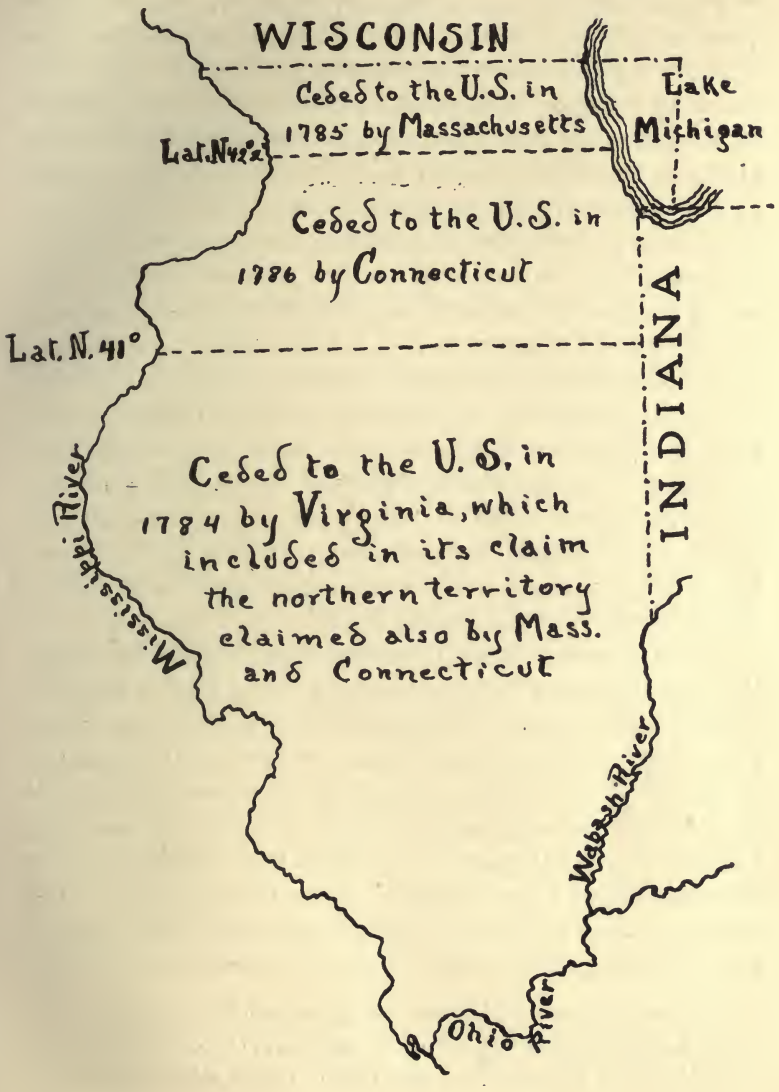
[1] *Cf.* Virginia Act of Cession. Thorpe, "American Charters, Constitutions and Organic Laws," vol. ii, p. 954.

[2] Virginia Act of Cession. Thorpe, vol. ii, p. 954.

[3] Journals of Congress, vol. x, p. 91 ff. [4] *Ibid.*, vol. xi, p. 160.

[5] Virginia Deed of Cession, 1684. Thorpe, vol. ii, p. 957.

MAP SHOWING CLAIMS OF EASTERN STATES TO TERRITORY IN ILLINOIS, CEDED BY THEM TO THE UNITED STATES



United States and Canada, and by the said line to the Lake of the Woods and the Mississippi,[1]—which last line, however, was an impossible one. This Act, therefore, designated the present western, southern, southeastern and also—save for a slight change introduced by enabling act of 1818,—the eastern boundaries of Illinois, for Virginia subsequently agreed to this division into states of the ceded territory.[2] The Ordinance further provided that "the boundaries of these three states shall be subject so far to be altered that if Congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan."

The Ordinance furthermore stipulated that its "articles shall be considered as articles of compact between the original states and the people and states in said territory and forever remain unalterable unless by common consent." This enactment passed by the Congress of the Confederation was reaffirmed by the First Congress of the United States in 1789 and changed only so far as requisite to adapt it to the constitution of the United States.[3]

At the commencement, therefore, of our national life under the constitution we find the present state of Illinois included within the Northwest Territory where it remained until the year 1800. In May of that year the President signed the act to divide the Northwest Territory into two separate governments by making Indiana Territory out of all that part of the territory northwest of the Ohio River, "which lies to the westward of a line beginning at the Ohio opposite to the mouth of the Kentucky, and running thence to Fort Recovery, and thence north until it shall intersect the territorial

[1] The Northwest Territorial Government. Thorpe, vol. ii, p. 957.

[2] Virginia Act of Ratification, 1788. Thorpe, vol. ii, p. 963.

[3] The Northwest Territorial Government, 1789. Thorpe, vol. ii, p. 963.

line between the United States and Canada," [1] Vincennes on the Wabash River being made the seat of government.

This act by which the present state of Illinois became part of the Indiana Territory went into effect on July 4th, 1800 from which time no further change of government or organization occurred until February, 1809, when the act was approved for dividing the Indiana Territory into two separate governments, to take effect on March 1st of that year. By this act the Territory of Illinois was created out of that part of Indiana Territory lying " west of the Wabash River and a direct line drawn from the said Wabash River and Post Vincennes due north to the territorial line between the United States and Canada," [2] with the seat of government at Kaskaskia, on the Mississippi River. The boundaries thus established for the new Territory of Illinois were the same as those provided in the Ordinance of 1787 for the westernmost state to be formed out of the Northwest Territory. Meanwhile by the purchase of Louisiana in 1803 the western boundary to the Illinois country, then part of Indiana Territory, ceased to be the dividing line between United States territory and foreign soil and Illinois was finally surrounded on all sides by territory belonging to the United States or some of them.

After changing from the first form of Territorial government to the representative form in 1812 the Illinois country was in 1817 ready for the most important step open to the inhabitants thereof, to-wit the formation of a separate state government. Ohio had been admitted as a state in 1802 with the boundaries designated by the Ordinance of 1787 for the eastern state to be formed out of the Northwest Territory (in case more than three were to be formed) with a proviso that if the northern boundary as prescribed by

[1] 2 United States Statutes at Large, 58.

[2] Territorial Government of Illinois, 1809. Thorpe, " American Charters, Constitutions and Organic Laws," vol. ii, p. 966.

that Ordinance should pass to the south of the mouth of the Miami River, it should, with the assent of Congress, be changed to include the mouth of said river.[1]

In 1816 Indiana was added to the states of the union with its eastern, southern, and western boundaries as prescribed in the same Ordinance but with its northern boundary ten miles north of the east and west line drawn through the southerly bend of Lake Michigan.[2] Congress added a proviso that the boundaries as determined be ratified by the constitutional convention of Indiana "otherwise they shall be and remain as now prescribed by the Ordinance" of 1787, whereby it appears that Congress expressly recognized that in so changing the northern boundary of Indiana it departed from the requirements of the Ordinance of 1787 in that respect, a fact worth noting in connection with the Illinois-Wisconsin boundary controversy some thirty years later, which was based on an alleged departure of the same kind in fixing the present northern boundary of Illinois. The enabling act for Indiana furthermore provided for concurrent jurisdiction on the Wabash River with the state to be formed west thereof so far as the said river should form a common boundary to both, which provision was not, however, expressly mentioned in the constitution of Indiana adopted in the same year.

In December, 1817, the territorial legislature of Illinois prepared a memorial to Congress praying for leave to form a state government in this territory,[3] which memorial was sent to the territorial delegate in Congress, Nathaniel Pope. On his motion a bill was introduced to authorize the formation of a new state as requested by the memorial, with the

[1] Constitution of Ohio, 1802. Art. vii, § 6. Thorpe, "American Charters, Constitutions and Organic Laws," vol. v, p. 2901.

[2] Enabling Act for Indiana, § 2. Thorpe, vol. ii, p. 1053.

[3] Journal of the Legislative Council, December 8, 1817.

northern boundary formed by an east and west line drawn through the most southerly bend of Lake Michigan in accordance with the Ordinance of 1787.[1] On motion of Mr. Pope himself, the enabling act was amended as to the boundary provisions by fixing the northern boundary at lat. 42° 30′, its present location, and including the quadrilateral in Lake Michigan bounded by the northern line of Indiana, the middle of Lake Michigan, the parallel n. 42° 30′ and the continuation of the western boundary of Indiana.[2]

This amendment as to the northern extent of the state was of the utmost importance both to the state of Illinois itself and, as Mr. Pope at that time prophesied, to the safety of the entire Union. Had the northern boundary been fixed as prescribed by the Ordinance of 1787, the state would have extended only to about lat. n. 41° 37′. By this amendment, therefore, offered by Mr. Pope on his own responsibility and without instructions from his constituents, fourteen of the present northern counties,[3] including a frontage on Lake Michigan and the present city of Chicago, were added to the state of Illinois. The enabling act was passed as amended without opposition,[4] and was approved in April, 1818.

Mr. Pope's chief arguments for giving Illinois a harbor on Lake Michigan were (a) the additional security to the Union against a possible desire of the southwestern states to break away from the rest by giving Illinois communication through the lakes with Indiana, Ohio, Pennsylvania and New York; (b) the encouragement of the construction of the Illinois-River-to-Lake-Michigan Canal. How wisely Nathaniel Pope foresaw the future in thus making Illinois the keystone state

[1] Annals of Congress, 1818, vol. ii, p. 1677.

[2] See Boundary Map, *infra*, p. 23.

[3] Jo Daviess, Stephenson, Winnebago, Boone, McHenry, Lake, Carroll, Whiteside, Lee, Ogle, DeKalb, Kane, Du Page and Cook.

[4] Annals of Congress, 1818, vol. ii, p. 1677. 15th Congress, 1st Session.

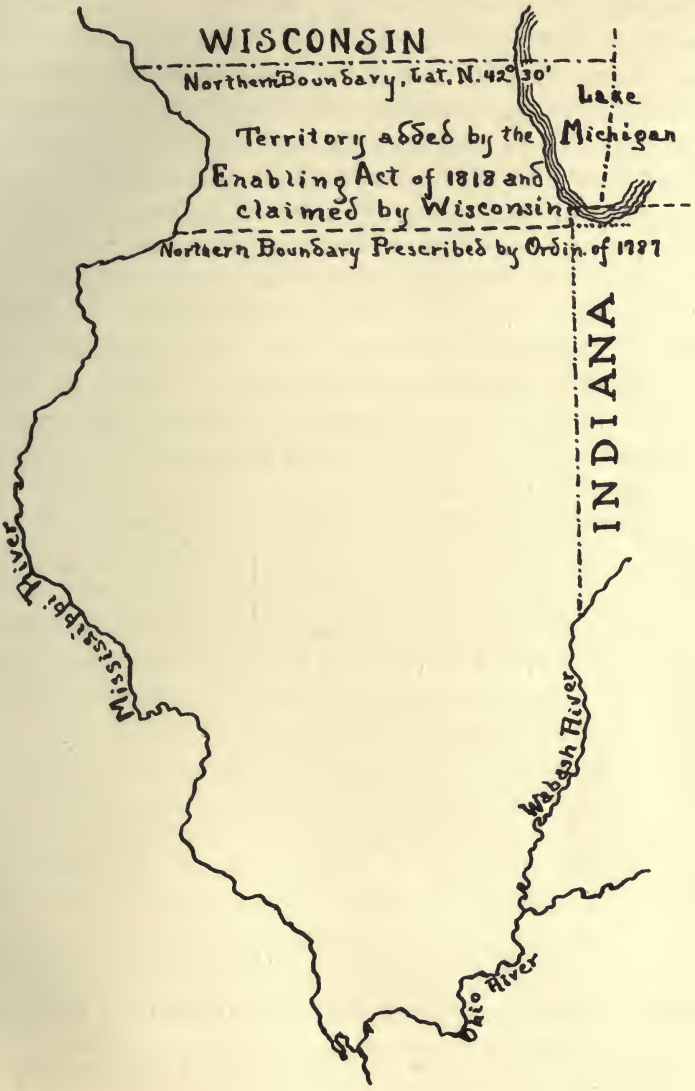
of the West was demonstrated over forty years later when the fate of the Union hung largely on the stand to be taken by Illinois in the War of the Rebellion. What the addition of so much productive territory, agriculturally and industrially, meant to the state is of course obvious, and it is small wonder, therefore, that Wisconsin, claiming that under the Ordinance of 1787 the boundary line of Illinois was fixed about 61 miles further south, should have made an effort to recover the territory between the line through the southerly bend of Lake Michigan and the latitude n. 42° 30′.

And so indeed she did, and for the ten years prior to the admission of Wisconsin as a state in 1848 the agitation of this boundary question was revived again and again. On the one hand the advocates of the Wisconsin claim, among them curiously enough very many of the Illinois citizens living in the disputed territory, contended that the Ordinance of 1787 was, as it in terms declared itself to be, a compact binding upon the United States and the several states, and unalterable save with the consent of all parties concerned; that the northern boundary of the southern state to be formed out of the territory of Illinois was fixed by the Ordinance of 1787 at the line through the southernmost part of Lake Michigan; and that the line of 42° 30′ having been fixed without their consent or that of the people living in the disputed territory was in violation of the Ordinance of 1787 and void. On the other side was the contention that the northern boundary as fixed by the enabling act of 1818 was consistent with and not in violation of the Ordinance of 1787, according to an interpretation of the words of Art. V, which will be referred to later on.

The two sides to this controversy have been so fully and clearly stated in several publications [1] that it is necessary to re-

[1] Wisconsin Historical Society Collections, vol. xi, pp. 494–501. "Boundary Dispute between Illinois and Wisconsin," Illinois Historical Society, May, 1904, Radebaugh; "The Beginnings of Illinois," Meese.

MAP SHOWING NORTHERN BOUNDARY OF ILLINOIS AS PRESCRIBED BY THE ORDINANCE OF 1787 AND ALTERED BY THE ENABLING ACT OF 1818



fer here only very briefly to the more important aspects. In 1838 the territorial legislature of Wisconsin sent a memorial to Congress protesting against the proposition to limit the Wisconsin territory by latitude 42° 30′ on the south, and asking that the territory be extended as far south as the Ordinance of 1787 provided. This was presented in 1839 to the Senate, and appears never to have been reported out of the judiciary committee.[1] In 1839 again the Wisconsin territorial legislature adopted resolutions, this time calling for a vote on the question of a constitutional convention, and advocating that the people in the disputed district be invited to express their opinion in the matter and send delegates to a convention if called. This was followed by a series of public meetings in the disputed territory, culminating in a convention at Rockford in July, 1840, in which delegates from nine counties declared in favor of the Wisconsin claim and their desire to belong to the latter state.[2]

But the people of Wisconsin itself were generally opposed to this movement, and in spite of repeated appeals by Judge Doty, who became governor of the Wisconsin territory in 1841, and who had from the first been a strong advocate of the rights of Wisconsin, nothing further was done until 1842. In June of that year Governor Doty, in a letter to the governor of Illinois, spoke of the disputed district as "one over which Illinois was exercising an accidental and temporary jurisdiction." Finally, after several meetings and ballotings in favor of the Wisconsin claim on the part of the cities in the disputed territory in Illinois, and several ballotings against the forming of a state government to include the disputed territory, by the inhabitants of Wisconsin territory itself, a last report was sent to Congress setting forth the claims of Wisconsin to the disputed territory, but was never

[1] Wisconsin Historical Society Collections, *supra*, n (1), p. 496.

[2] *Ibid.*, pp. 496 and 497.

acted upon by that body. In the Wisconsin constitutional convention of 1846 an attempt was made to introduce a provision calling for the determination of this boundary question by the Supreme Court of the United States, but this failed of adoption by the convention.[1]

For a while it had seemed as though serious consequences might result from the feeling engendered by the dispute,[2] but the matter was forever settled as a living question when in 1848 Wisconsin accepted as her southern boundary the line 42° 30′. That this determination of the question did not, however, convince everyone of its justice or even legality appears from Thwaite's concluding remarks on the controversy as late as 1888, to the effect that "Wisconsin became a state in 1848, stripped by the youthful greed of her southern neighbor and political manoeuvering in Congress of 8500 square miles of the richest and most populous territory in the entire Northwest."[3]

The supporters of the right of Illinois rested their claim on the ground that the words of Article V of the Ordinance of 1787, permitting Congress to form one or more states "in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan," did not mean that the line could not be put farther north if Congress so pleased. Governor Ford thought the Ordinance of 1787 was not violated by the provisions as to the boundaries in the enabling act. "There is nothing," he writes, "in the Ordinance requiring such additional state to be formed *of* the territory north of that line; another state might be formed *in* that district of coun-

[1] Wisconsin Historical Society Collections, vol. xi, pp. 498–501.

[2] See language of Governor Doty, Wisconsin Historical Society Collections, xi, p. 500, and that of D. A. J. Upham a member of the Wisconsin Legislative Council. *Ibid.*, p. 499.

[3] Wisconsin Historical Society Collections, vol. xi, p. 501.

try though not *of* it, it need not necessarily include the whole. By extending the limits north of the disputed line Congress still had power to make a new state *in* that district north of it, not including the portion given to Illinois."[1]

Nathaniel Pope himself in offering the amendment changing the boundary seems to have believed it to be in accord with the Ordinance of 1787, for in the same breath, almost, with the proposal of the changed boundary he affirmed the binding nature of the Ordinance.[2] Congress, however, clearly realized that the proposed boundary was in violation of the Ordinance of 1787, as evidenced by the provision relating to the Indiana northern boundary,[3] as well as by the express language of the enabling act for Illinois, Sec. 4: "Provided that the same (*i. e.* the state government) whenever formed shall be republican and not repugnant to the Ordinance of the thirteenth of July, 1787, *excepting so much of said articles as relate to the boundaries of the states therein to be formed.*"[4] From this it appears, therefore, that Congress did not consider the Ordinance of 1787 as binding upon them and hence they were free to repeal it if they chose or ignore any part of it by such enactment, as is moreover shown also by the change in the number of inhabitants required for the forming of a state, sixty thousand in the Ordinance to forty thousand for Illinois in the enabling act.

There remained, therefore, two important questions unsolved at the time Wisconsin finally accepted the 42° 30′ boundary line, which stood in the way of a clear claim on her part to the disputed territory; first, was Article V of the Ordinance of 1787 at all binding on the Congress in sub-

[1] Ford, "History of Illinois," p. 21.

[2] Annals of Congress, 1818, vol. ii, p. 1677.

[3] Annals of Congress, 1818, vol. ii, p. 19.

[4] Enabling Act for Illinois, 1818. Thorpe, vol. ii, p. 967.

sequent years and, second, if so, did this boundary provision violate the requirements of said article. Inasmuch, as the United States Supreme Court was never called upon to decide these questions it must ever remain conjectural as to what the legal determination of the question would have been in that tribunal of last resort.

As regards jurisdiction on the Wabash River the enabling act provided that Illinois should have concurrent jurisdiction with Indiana, as also on the Mississippi River with any state or states to be formed west thereof, so far as said rivers should form a common boundary.

In August, 1818, the first constitution of Illinois ratified the boundaries assigned by Congress, omitting the provisions as to concurrent jurisdiction mentioned above. At this time six other states of the eighteen having constitutions had inserted a clause defining their boundaries,[1] though none was to be found in the New England or in the eastern states north of Virginia.

In the constitution of 1848 the reference to the boundaries was embodied in a separate paragraph and a few minor changes made in the wording.[2] The most important change from the provision in the first constitution was the addition of the proviso at the end of the article, relative to jurisdiction on the Ohio River, to the northwest shore of which Illinois only extended, to the effect that "this state shall exercise such jurisdiction upon the Ohio River as she is now entitled to, or such as may hereafter be agreed upon by this state and the state of Kentucky."

The article on Boundaries in the present constitution was adopted without change from the constitution of 1848, as

[1] Georgia 1798, art. i; Indiana 1816, art. xi, sec. 17; North Carolina 1776, xxv; Ohio 1802, art. viii, sec. 6; Tennessee 1796, art. xi, sec. 32; Virginia 1776, next to the last paragraph.

[2] Journal of the Convention of 1847, p. 572.

was also the case in framing the proposed constitution of 1862.

Though the language of the Boundary article seems clear and unambiguous, questions have frequently arisen both in the state and in the federal courts requiring a construction of the language and a more definite determination of the jurisdiction and territorial extent of Illinois. The western boundary line described as running from the middle of the Mississippi River at lat. n. 42° 30′ "thence down along the middle of that river to its confluence with the Ohio River," has in several cases been held to be the middle of the main navigable channel as usually followed, and though the river may change imperceptibly from natural causes, the river as it runs continues to be the boundary.[1] But if the river should suddenly change its course or desert the original channel, the boundary remains the middle of the deserted river bed.[2] Furthermore, it is the main permanent river that constitutes the boundary, not that part which flows in seasons of high water and is dry at other times. Although the physical boundary of Illinois extends only to the middle of the river as defined above, its jurisdiction for entertaining suits is concurrent over the whole river with the states of Iowa and Missouri, by virtue of the Enabling Act for Illinois and those for the above two states.[3] So it was held that Illinois courts could take jurisdiction of a case growing out of a collision near the Missouri shore of the Mississippi River, though beyond the physical boundary of the state, and apply the laws of Illinois to the settlement of the case.

[1] St. Louis *v.* Rutz, 138 U. S., 249; Iowa *v.* Illinois, 147 U. S., 1. The enabling act for Missouri, 1820, expressly designated the middle of the main channel of the Mississippi River as the boundary for that state along that river, and the enabling act for Illinois designating merely "the middle of the river" was held to mean the same thing.

[2] Buttenuth *v.* St. Louis Bridge Co., 123 Illinois, 536.

[3] Thorpe, "American Charters, Constitutions and Organic Laws."

The boundary on the Ohio River is expressly limited by the enabling act of 1818 to be along the northwestern shore, and hence Illinois can exercise no jurisdiction over the Ohio River except by consent of Kentucky. The rights and extent of Illinois along that boundary have not been adjudicated directly, but in one case [1] involving the boundary between Indiana and Kentucky, the United States Supreme Court, affirming earlier cases, says "it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the northwestern banks of the Ohio River." In another case [2] the same court had said "when a great river is the boundary between two states and one state is the original proprietor and grants territory on one side only" —as was the case when Virginia made her original grant of land—"it retains the river within its boundaries and the territory granted extends to the low-water mark on its side of the river." This being true of Indiana's rights on the Ohio which were not expressly limited by the enabling act for that state, it is *a fortiori* true for Illinois the extent of which is expressly limited. But with consent of Congress, Illinois might by agreement with Kentucky obtain jurisdiction over the Ohio River and for that purpose the constitutions of both 1848 and 1870 contain a provision regarding such agreement with Kentucky.[3] To make such agreement binding the consent of Congress is necessary [4] though such consent need not be expressed but may be implied.[5]

[1] Henderson Bridge Co. *v.* Henderson City, 173 U. S., 592.

[2] Hadley *v.* Indiana, 5 Wheaton, 379.

[3] See art. i Constitution of Illinois. Though this proviso has now been in the constitution of Illinois for over sixty years, and relates to a matter which would seem to be of considerable importance to the state, no record can be found in the State Department of either Illinois or Kentucky of any attempt to come to any such agreement as this proviso contemplates.

[4] Virginia *v.* West Virginia, 11 Wallace, 39.

[5] Virginia *v.* Tennessee, 148 U. S., 503.

By the enabling acts for both Indiana and Illinois, these states are given concurrent jurisdiction over the Wabash River, and the decisions relating to jurisdiction of this state on the Mississippi River are equally applicable to the Wabash River boundary. The extent of the territory and jurisdiction of Illinois into Lake Michigan were judicially determined to be as provided by the enabling act and the present constitution of Illinois in the case of *Ill. Central R. R. v. Illinois*, 146 U. S., 387.

Finally, though the northern boundary which as we have seen was the cause of an extended controversy for almost a decade, seems not to have been the subject of judicial opinion, it appears from a letter of Professor John E. Daviess, of the United States Coast and Geodetic Survey, written to the Secretary of the Wisconsin State Historical Society, that the line as it is now marked out by boundary posts does not represent the parallel 42° 30′ as the constitution of each state prescribes, "but zigzags to and fro, and should go farther south than it now is—about three-fourths of a mile—in the western part of Wisconsin, and farther north in and east of Beloit." [1]

[1] Wisconsin Historical Society Collections, xi, p. 501 n.

ARTICLE II

BILL OF RIGHTS[1]

THE constitutional practice of embodying in the fundamental law of a state a declaration of the rights and liberties of the individuals in that state, a practice so familiar to us living under the constitution of the United States as to be regarded almost as a matter of course, is distinctively American in origin, and had its genesis less than a century and a half ago. The famous Virginia Bill of Rights drawn up by George Mason and adopted on June 12, 1776, by a convention of members of the old Virginia House of Burgesses, was the first embodiment of the principle that certain rights of the individual are so sacred that their inviolability should be secured in the highest expression of the sovereign will of the people.

The example of Virginia in thus formally declaring certain rights and liberties of the people to pertain to them and their posterity as the basis and foundation of government, was followed in every one of the eleven states which adopted constitutions following the resolution of the Continental Congress in May, 1776, advising such action by the colonies.

Never had the belief in the existence of inviolable personal rights been so general as in the century preceding the American Revolution, and nowhere had this doctrine re-

[1] The interpretation of Magna Carta given here is designed to show the views generally accepted among American constitution makers, and is not intended to represent the conclusions of recent critical scholars, like Maitland and McKechnie.

ceived wider recognition than among the American colonists. The principle of individual liberty, religious, political and personal, was so fundamental in the political thought of that time and place that the idea of guaranteeing this freedom by declaring it in the basic law of the government met with immediate and universal approval and acceptance, not only in the subsequent state constitutions, and in the federal constitution in this country, but in the constitutions of other countries as well.[1]

To say that the idea of constituting these fundamental rights a part of the basis of government originated in the American colonies in 1776, is not to say that the belief in the existence of such rights originated then and there. Indeed the consciousness of the existence of such rights and even the formal declaration of their nature and extent began centuries before, and extended through a period during which the constitutional principles and political philosophy from which these rights and liberties were evolved and developed, underwent many radical changes.

The doctrine of individual rights free from interference or even destruction by the state was unknown to the political philosophy of the Greeks, to whom the state was absolutely sovereign. Nor does this principle find recognition among the Romans or even in the middle ages, which knew individual rights only in the shape of contractual relations arising out of an interest in the soil.[2] But in England certain customs and rules of the common law had from early times afforded some measure of protection for individuals as regarded their personal liberty and security, and the violation and destruction of such liberty and security at the hands of the king aroused that protest and resistance which finally

[1] The French Declaration of the Rights of Man, 1793. The constitutions of the South American countries have followed this practice as well.

[2] Scherger, "The Evolution of Modern Liberty." Introduction.

culminated in the first formal recognition of the rights of English subjects, the Great Charter of King John in 1215.

In this, the earliest charter of liberties, is found the model for many of the provisions of the Virginia Bill of Rights, the prototype of all the others. So, for instance, the prohibition on excessive fines and on cruel and unusual punishments is directly traceable to chapter 20 of the Great Charter, unreasonable seizure is forbidden in effect in chapter 38, and the protection of trial according to the law of the land was virtually embodied in chapter 39.[1] Still other provisions of the Great Charter were adopted by some bills of rights framed immediately after that of Virginia, and copied from them into the later constitutions, among which provisions may be mentioned the assurance of right and justice without sale, denial, or deferment,[2] and the right of free egress from and ingress to the country.[3]

These several guarantees embodied in the Great Charter were repeatedly affirmed by later kings, only to be as repeatedly violated, until again solemnly declared by the people, this time through their representatives in Parliament, in the second great charter of liberties, the Petition of Right to Charles I in 1628. In this document the principal ground of complaint was the violation of the due process of law provisions in the Great Charter and the statute 20 Edward III., through the application of martial law in times of peace, and the unjust quartering of soldiers and sailors upon the subjects.[4]

In 1679 the Habeas Corpus Act[5] reaffirmed another common law right which a century later was regarded as of fundamental importance by the framers of many of our

[1] Stubbs, "Select Charters Illustrative of English Constitutional History," p. 296.

[2] Magna Charta, ch. 40.

[3] *Ibid*, ch. 42.

[4] Stubbs, "Select Charters, etc.," p. 515.

[5] *Ibid.*, p. 517.

American bills of rights, though not found in the Virginia constitution of 1776. Then, finally, in 1689 the English Bill of Rights, declared upon the accession of William and Mary, in denunciation of the abuses of the late King James II. as a warning and guide to the new rulers, still further increased the number of individual rights thus established in England by formal declaration. Among the additional securities provided were the fundamental rights of petition, of bearing arms, of free elections and of freedom of speech and debates in the legislature.[1]

In addition to the rights thus formally established by the series of English constitutional documents, there were certain other doctrines of the common law which every English subject regarded as his birth-right, and which seemed of sufficient importance to the colonists to deserve embodiment in their enumeration of inviolable rights. Some of these rights had indeed always been kept sacred in England by the crown, but others had been repeatedly ignored, and all were the heritage of the colonists, and were deemed worthy of the new protection which the written constitutions were meant to guarantee.

Such then were some of the sources from which the American statesmen in 1776 derived their ideas of fundamental rights, ideas in no sense, therefore, newly discovered or declared at that time. On the contrary they were, in the language of the English Bill of Rights itself, "ancient rights" to which every English subject had been entitled by the course of the common law and the statutes.

But the American bills of rights contained still other declarations, which had not previously been embodied in any charter or petitions, and which were not recognized by the common law, the origin of which is traceable to a different

[1] Stubbs, "Select Charters Illustrative of English Constitutional History," p. 523.

source, namely, the then recent emphasis and general acceptance of the theory of natural law as developed in the works of Milton, Harrington and Locke in England, and in those of eminent writers of continental Europe, during the seventeenth century.

The theory of natural law, originated almost five centuries before Christ by Heraclitus and developed in Greece by the Stoics and their successors, could come to no fruition in the birth of private rights in that period when the sovereignty of the state was absolute.[1] But the effect of this theory upon the development of the doctrine of natural rights, two thousand years later, when political concepts had radically altered, was most potent.

In the philosophical theory of natural law as expounded in the seventeenth century was embodied the concept of inherent, natural, inalienable rights appertaining to men as men, and which no government could rightly abridge or destroy. More than a century before the American Revolution, Milton had defined the purpose of government to be the preservation of the liberty, peace and safety of the people, and had declared that all men are naturally born free, and that liberty of the press and of conscience should be respected. Developing this theory still further, Locke contended that men lost none of their natural rights by entering into the state of society, but surrendered only so much of their liberty as was absolutely necessary to establish government.[2]

These views, championed by many noted publicists of the seventeenth and eighteenth centuries, were well known to the leaders among the American colonists, in whose temperaments they found a ready response, and whose difficulties they seemed so satisfactorily to solve. The Massachusetts Body of Liberties had as early as 1641 contained a

[1] Scherger, "The Evolution of Modern Liberty," ch. I.

[2] *Ibid.*, ch. ii.

statement and guarantee of many of these rights,[1] and a century or more later James Otis, John Adams and Samuel Adams, filled with enthusiasm for the doctrine of natural law and natural rights, had made this captivating theory the common knowledge of the American colonists.[2]

Inflamed with the memory of recent tyrannies and oppressions, engrossed in the terrible struggle they had just commenced in behalf of their liberties, and conscious that even a democracy furnishes no necessary guarantee of liberty, the colonists almost inevitably accorded to the declaration of the nature and purpose of government, and of the rights of liberty of conscience, speech, and press so important a place in the structure of their constitutions.

When, therefore, in 1818 the framers of the first Illinois constitution were confronted with the problem of drawing up a statement of the fundamental law for the new commonwealth, there was nothing novel, either in the doctrine of inviolable personal rights and liberties or in the practice of guaranteeing them in the constitution by express enumeration. Not only had all of the eighteen state constitutions in force when Illinois became a state contained such a declaration of individual rights, as had also the Declaration of Independence and the federal constitution, but in France also had this principle received effective recognition in the Rights of Man prefixed to the Constitution of 1793.[3]

Of the most immediate and determining influence, no doubt, in shaping the Illinois bill of rights was the famous Northwest Ordinance of 1787, under which, with but slight changes, the framers of the Illinois constitution were then living, and which for thirty years past had been the organic

[1] Stimson, "Federal and State Constitutions of the United States," Book II, ch. i.

[2] Scherger, *supra*, ch. ix.

[3] Lieber, "Civil Liberty and Self-Government," p. 536.

law of the territory now about to be formed into a state. This Ordinance contained six articles of compact, of which the first two constituted virtually a bill of rights, which though shorter and more concise were practically as comprehensive as many of the more verbose declarations in the existing state constitutions.[1] The authorship of this celebrated Ordinance seems to be a matter of dispute, but whether it was chiefly the work of Putnam, Cutler, Dane or Jefferson, or, what is more probable, a combination of the ideas of them all, it unquestionably offered a more natural and familiar model for the framers of the first Illinois constitution than did even the Virginia bill of rights and its copies in the other states, all of which undoubtedly exerted a considerable influence as well.

Section 1.[2]—The first section of the bill of rights of the constitution of Illinois begins by declaring men to be by nature free and independent, and to possess those inherent and inalienable rights which, as has been seen, occupied so important a place in the political philosophy of the seventeenth century. The constitution of 1818 had declared that "all men are born free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring and possessing and protecting property and reputation, and of pursuing their own happiness," using language

[1] Thorpe, "American Charters, Constitutions and Organic Laws," vol. ii, p. 957.

[2] "All men are by nature free and independent and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." *Constitution of Illinois*, 1870, Art. ii, Sec. 1.

very similar to that of the Virginia Bill of Rights of 1776,[1] and of the Declaration of Independence in the same year.[2]

The assertion that all men are born equally free and independent was given further effect in Illinois by the prohibition on slavery,[3] whereas in Virginia this declaration was believed not to apply to the negroes.[4] Though property and reputation were first included among the fundamental individual rights, along with life, liberty, and the pursuit of happiness by the Massachusetts Body of Liberties (Preamble)[5] in 1641, this broader enumeration was to be found in only one state constitution in 1818, namely, that of Pennsylvania, 1790,[6] from which apparently the whole of this section in the Illinois constitution of 1818 was taken.

The essentially American doctrine of the sovereignty of the people, and the principle of the basis and purpose of government were declared in the words, "all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness," which had been stated in precisely the same terms in the constitutions of Indiana, 1816, and Pennsylvania, 1790, and in very similar language in a number of the other state constitutions.

In the constitution of 1848 all these provisions were adopted from the first constitution without the slightest change, though the original committee report included in addition an express declaration of the right of the people to alter the government whenever the public good requires it; a provision found in the original Virginia Bill of Rights and

[1] Constitution of Virginia, 1776. Bill of Rights, sec. 1. Thorpe, "American Charters, Constitutions and Organic Laws," vol. vii, p. 3812.

[2] Declaration of Independence, Par. 2. Thorpe, *supra*, vol. i, p. 4.

[3] Constitution of Illinois, 1818, Art. vi, Sec. 1. Thorpe, vol. ii, p. 980.

[4] Stimson, "Federal and State Constitutions of the United States," p. 21.

[5] Stimson, *supra*, p. 20.

[6] Art. ix, Sec. 1.

in the Declaration of Independence, and upon the apparently self-evident principle of which rested the theoretical justification of both the English and the American Revolutions.[1]

In the constitution of 1870 the somewhat prolix statement of the earlier constitutions was abandoned for the concise wording of the Declaration of Independence, with the addition of the protection of property as one of the purposes of government. A change in wording that aroused some opposition in the constitutional convention of 1869 was the unqualified declaration that all men are by nature independent, in place of the modified form "equally independent" contained in the former constitutions. Several suggestions were made to alter this by adding qualifying phrases or by striking it out altogether as being contradictory to the real place of man before God and among his fellowmen, but this absolute declaration of man's independence was retained, though not found in the early constitutions nor even in the Declaration of Independence, and contained in but three of the thirty-six other constitutions in force in 1870.

In Illinois, as has been seen, the assertion of man's independence was never qualified by considerations of race or color, but extended in effect, as it did in terms, to all men. Liberty and property as used in the constitution have been repeatedly defined by the courts in cases involving alleged violations of the due process of law provisions, and may therefore best be considered in the discussion of the following section.

Section 2.[2]—Section 2 contains the prohibition against

[1] In the proposed constitution of 1862, the convention adopted the exact language of the Declaration of Independence, with reference to these personal rights, adding, however, the right of acquiring, possessing and protecting property.

[2] "No person shall be deprived of life, liberty or property without due process of law." *Constitution of Illinois*, 1870, Art. ii, Sec. 2.

deprivation of life, liberty or property without due process of law, which has proved to be the most effective guarantee of individual rights as against the government, not only as interpreted and enforced by the state courts but also as applied by the federal courts under the fourteenth amendment of the United States constitution. The first constitution of Illinois declared that no freeman should be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property but by the judgment of his peers or the law of the land. This provision was virtually a copy of chapter 39 of the Great Charter of King John of 1215 as amended and affirmed by chapter 35 of the Great Charter of Henry III., two years later,[1] but with the addition of the phrase, "or deprived of his life, liberty or property."

The second article of compact in the Northwest Ordinance of 1787 had also declared that no man should be deprived of liberty or property but by the judgment of his peers or the law of the land, and similar provisions had been embodied in more than two-thirds of the state constitutions in force in 1818, though not generally limited to freemen, a limitation probably retained in the constitution of Illinois merely by oversight, since slavery was prohibited by the Constitution.[2]

No change was made in the wording of this section until the adoption of the present constitution, when the essence of the provision was embodied in the short statement of the present section copied from amendments V and XIV of the federal constitution, the latter of which had been adopted but a year before the constitutional convention of 1869 met in Springfield. At that time about one-third of the state constitutions still retained the original form, "but by the judgment of his peers"—which meant trial by jury—

[1] Stubbs, "Select Charters," pp. 301, 346.

[2] See *supra*, p. 38.

and "or the laws of the land"—which meant indictment and procedure at common law[1]—though a number employed its now famous equivalent "by due process of law." This phrase appeared first in the Statute 28 Edward III., chapter 3, and was not found in any state constitutions prior to the adoption of Amendment V in the constitution of the United States.

This constitutional guarantee of life, liberty and property against deprivation save by due process of law, has been expounded and applied in an enormous mass of cases in this state, as in all the others, which it would be impossible to discuss in detail, though a few general definitions may be helpful in showing the remarkable scope of this apparently simple provision.

"Liberty," as used in the constitution, means not only freedom from servitude and restraint, but also the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such a vocation or calling as he may choose, subject only to the restraint necessary to secure the common welfare.[2]

"Property" is not only the physical thing which may be the subject of ownership, but also the right of dominion, possession and power of disposition over it, and includes as well the right to acquire it in any lawful mode or by following any lawful pursuit which the citizen in the exercise of the liberty guaranteed may adopt.[3]

The privilege of contracting is, therefore, both a liberty and a property right within the protection of the constitution,[4] a doctrine which has caused the invalidation of a large number of laws passed for the protection of laborers. A

[1] Stimson, "Federal and State Constitutions of the United States," p. 16.

[2] Braceville Coal Company *v.* People, 147 Illinois, 66 (1893).

[3] *Ibid.*

[4] Frorer *v.* People, 141 Illinois, 171 (1892).

number of cases deal with the question of what are "vested rights," as these only are property within the protection of this clause. So, for example, there is no vested right in existing rules of evidence [1] nor to particular remedies [2] and in general mere rights in expectancy, as the expectancy of inheritance are not vested rights.[3] Rights of action are, however, protected,[4] as are also accrued defences.[5]

"Due process of law" has been variously defined and variously interpreted, but no definition can be at the same time comprehensive and accurate. It is synonymous with "the law of the land," and Cooley cites with approval the definition of this latter phrase given by Webster in the Dartmouth College Case: "By the 'law of the land' is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." [6] Very similar is the definition given by the Illinois Supreme Court. [7]

Without examining in detail the different applications of the requirement of due process it suffices here to mention that it demands the equal protection of the laws, excluding unreasonable class legislation, that is, legislative discrimination not based on reasonable differences,[8] laws tending to grant monopoly rights, and the imposition of special burdens

[1] Meadowcroft *v.* People, 163 Illinois, 56 (1896).

[2] Smith *v.* Bryan, 34 Illinois, 364 (1864).

[3] Cooley, "Constitutional Limitations" (ed. 7), p. 512.

[4] Van Inwagen *v.* Chicago, 61 Illinois, 31 (1871).

[5] McDuffee *v.* Sinnott, 119 Illinois, 449 (1887).

[6] Cooley, "Constitutional Limitations," p. 502.

[7] Millet *v.* People, 171 Illinois, 299 (1898).

[8] *Ibid.*

and liability without just cause.[1] In the judicial proceedings themselves, it makes, above all, the requirement of competent jurisdiction in the tribunal undertaking to affect the property rights of individuals.[2]

The most important limitation on the individual's right to the undisturbed enjoyment of his property, besides the right to eminent domain, and the taxing power, is the so-called police power of the state. But even this power can be exercised only within the bounds necessary to protect the public health, safety and comfort, and any interference beyond that violates the guarantee of due process of law.[3]

Section 3.[4]—Liberty of conscience and freedom of religious worship were of course regarded by the American colonists as one of the most essential of the inherent, inalienable rights of man, and the religious persecutions in their mother country had profoundly convinced them of the need of guaranteeing this right against governmental interference. Accordingly there is found in the first constitutional declaration of man's rights, viz., the Virginia Bill of Rights of 1776, a guarantee of religious freedom, notwithstanding that the Anglican church was then the established church of that commonwealth. Similar guarantees of the liberty of conscience and

[1] Bessette *v.* People, 193 Illinois, 334 (1901).

[2] Bickerdike *v.* Allen, 157 Illinois, 95 (1895).

[3] Ruhstrat *v.* People, 185 Illinois, 133 (1900).

[4] "The free exercise and enjoyment of religious profession and worship, without discrimination shall forever be guaranteed: and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." *Constitution of Illinois*, 1870, Art. ii, Sec. 3.

religious worship were inserted into all the subsequent constitutions adopted before Illinois became a state,[1]—with the single exception of Louisiana, 1812, in which state the prevailing religion was that of the Roman Catholic Church,[2]—and the first article of compact of the Northwest Ordinance declared that no person demeaning himself in a peaceable and orderly manner should ever be molested on account of his mode of worship or religious sentiments.[3]

In the first constitution of Illinois the guarantee of liberty of conscience and religion contained detailed provisions taken from a number of different constitutions, relative to the natural and indefeasible right to worship according to the dictates of one's own conscience and the freedom from control in that respect by any human authority; immunity from taxation for the support of any place of worship or ministry; prohibition on giving preference by law to any religious establishment or mode of worship, and a requirement that no religious test ever be demanded as a qualification to any office in the state. These provisions were all adopted verbatim into the constitution of 1848, as also into the proposed constitution of 1862. In the convention of 1847 the committee reported a qualification on the prohibition against being compelled to erect or support a place of worship against one's consent, by the addition of the words "contrary to what he has deliberately and voluntarily engaged to perform." This qualifying phrase, which was found in a number of the other constitutions, might have proved to be of considerable importance had the state courts

[1] In a number of the states, however, political equality was assured to those only who professed the Protestant faith.

[2] The French Declaration of the Rights of Man had, however, guaranteed the free exercise of religion. Rights of Man, section 7. Lieber, "Civil Liberty and Self-Government," p. 537.

[3] Thorpe, "American Charters, Constitutions and Organic Laws," vol. ii, p. 960.

taken the same view of the language of this prohibition that the United States Supreme Court did of the prohibition of the thirteenth amendment of the federal constitution, by which "involuntary servitude" was held to mean personal service, involuntary at time of performance even though voluntarily contracted for.

The section in the present constitution with reference to religious freedom and liberty of conscience is even more comprehensive than that of the former constitutions, though in substance quite similar. The added provision that "no person shall be denied any civil or political right, privilege or capacity on account of his religious principles" had been reported out by the committee in the convention of 1847, but was omitted in the section as finally adopted. It was introduced to cover both the matter of competency of witnesses as found in the New York constitution of 1846 as well as the then existing Illinois provision as to religious tests as qualifications for office, omitted in the present constitution.

The express limitation of the guarantee of liberty of conscience so as to permit the requirement of oaths or affirmations, and to exclude the commission of acts of licentiousness or practices inconsistent with the peace or safety of the state, was not found in the constitution of 1848, though the then recent trouble with the Mormons would have seemed to call especially for such a proviso at that time. In the convention of 1869 the introduction of this proviso, then found in over one-third of the existing constitutions, called forth considerable opposition to its adoption, on the ground that the proviso was inconsistent with the preceding guarantee of religious freedom.[1]

The last sentence of the section, viz., the prohibition on

[1] Debates of the Convention of 1869, p. 1560.

compelling attendance on or support of any ministry or place of worship, and on giving any preference by law to any religious denomination or mode of worship presents no material change from the earlier provisions on these points. In the convention of 1869 there were presented four petitions, requesting an express constitutional protection of the right to observe the seventh day of the week as the Sabbath, and an additional section exempting persons who conscientiously observe the seventh day as the Sabbath from answering civil process on that day, was moved and adopted, but on reconsideration was stricken out.[2]

The Illinois cases construing this section of the constitution are few in number, but some of the general principles to be gathered from the construction of similar provisions in other constitutions will show how the courts have in general viewed the protection embodied in such provisions. The express prohibitions of the section guarantee not only religious toleration, but religious equality. They do not however prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires.[1] Nor does the right of free thinking and free speech justify blasphemy, or prevent its punishment by the law, when uttered in a wanton manner with a wicked and malicious disposition and not in a serious discussion upon any controverted point in religion.[2] Laws requiring the observance of the Christian Sabbath are almost universally upheld as not violating this constitutional provision, though Cooley questions the entire soundness of that view.[3]

In Illinois under the present constitution the right to

[1] Debates of the Convention of 1869, pp. 1566, 1777.

[2] Cooley, "Constitutional Limitations." p. 668.

[3] *Ibid.*, p. 673. [4] *Ibid.*, p. 675.

testify is included among the civil rights, privileges, and capacities which are protected by this section against denial by reason of religious opinions,[1] though under the earlier constitutions an atheist was, in accordance with the common-law rule, incompetent as witness.[2] The constitution of 1870, therefore, abrogated all restrictions as to the competency of witnesses on account of defect of religious belief.[3]

Section 4.[4]—Liberty of speech and of the press, under certain limitations, was protected in England by the principles of the common law, and considered essential to the nature of a free state. But in England, for years before the American Revolution, there had been serious invasions of this right, and in the American colonies there had never been any real freedom of speech or of the press.[5] In the seventeenth century Milton had in England championed these liberties in his *Areopagitica*, and the numerous appeals to natural law by James Otis and John and Samuel Adams in the American colonies, all included them among the fundamental individual rights.[6] The Virginia Bill of Rights declared the freedom of the press to be one of the great bulwarks of liberty which could never be restrained, and in 1818 the federal constitution and all the state constitutions but two, viz., New Jersey, 1776, and New York, 1777, contained similar pro-

[1] Ewing *v.* Bailey, 36 Illinois Appeals, 191 (1890).

[2] Central Military Tract Railroad Company *v.* Rockafellow, 17 Illinois, 541 (1856).

[3] Hrouek *v.* People, 134 Illinois, 139 (1890).

[4] "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty, and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends shall be a sufficient defence." *Constitution of Illinois*, 1870, Art. ii, Sec. 4.

[5] White, "The Constitution of Pennsylvania," ch. V.

[6] Scherger, "Evolution of Modern Liberty," ch. IX.

visions as to freedom of the press, a number of them expressly protecting also the liberty of speech.

In the first constitution of Illinois freedom of the press was guaranteed to all who examined the proceedings of any branch of the government, this having been the point of attack by the English government in the past, and to every citizen was guaranteed the right to freely speak, write and print on any subject, being responsible for the abuse of that liberty. These provisions were embodied without change in the constitution of 1848 and in the proposed constitution of 1862.

In the constitution of 1870 all but the last sentence was omitted, which contained the essence of the entire section, and every one of the twenty-six other state constitutions then in force guaranteed freedom of the press, which of course includes freedom of speech, either to all persons, as is the case in the Illinois constitution of 1870, or to all citizens, as was done in the earlier Illinois constitutions.

The establishment of truth when published with good motives and justifiable ends, as a sufficient defense in all trials of libel, both civil and criminal, was inserted to protect more specifically the liberty of press previously guaranteed in general terms. In the constitution of 1818 it was declared that in prosecutions for the publication of papers investigating the official conduct of officers, or of men acting in a public capacity, or where the matter published is proper for public information, the truth might be given in evidence, and that in all indictments for libels the jury should have the right of determining both the law and the fact, as in other cases.

At common law there had been an important distinction between civil actions for libel and criminal prosecutions for the same as to both of these provisions, viz., the admissibility of truth as a defense, and the function of a jury in a trial for

libel. While truth of the matter published was always a defense to a civil action for libel, since a man had no right to a better reputation than his real character deserved and was therefore not injured by any true statement concerning him, in criminal prosecutions for libel, the truth of the matter published being rather a greater provocative to the person libeled to retaliate by acts involving a breach of peace —which last consideration was the original basis of all common-law jurisdiction of crimes—could not be pleaded as a defense.[1] This rule as regards criminal libel was changed in England by Lord Campbell's Act, 6 and 7 Victoria, chapter 96, and the provision in the Illinois constitution of 1818 expresses in other terms the general form of the change in law admitting truth as a defense when published with good motives and for justifiable ends.

As regards the function of the jury in trials for libel, the common-law rule in civil actions left it to the jury, if the words published were ambiguous, to decide whether or not they were libellous, that is, to pass on both the law and the fact. The same doctrine was asserted in several early cases as regards criminal prosecutions for libel, but was subsequently greatly controverted, and was certainly an anomalous one in the criminal law.[2] But by the Fox Act of 1774 the jury was permitted to render a verdict of guilty or not guilty upon the whole matter in issue, and thus act as judges both of the law and the fact in criminal prosecutions also. The provisions in the Illinois constitution, therefore, adopted the later statutory rule in both of these regards as guaranteeing fundamental rights, as had also previously been done in six other constitutions of that time. The constitution of 1848 and the proposed constitution of 1862 both contained the above provisions without the slightest change.

[1] Chase's Blackstone, Book III, ch. VI.

[2] *Ibid.*

In the present constitution of Illinois, the truth when published with good motives and for justifiable ends was made a sufficient defense in both civil and criminal trials, reaffirming the former provision as to criminal trials, and also placing the defendant in a civil suit under the same constitutional protection. By 1870 the great majority of the other states had inserted a constitutional provision like that in the Illinois constitution of either 1848 or 1870. In the convention of 1869 the newspapers of the state sought additional protection in a petition requesting an addition to the provision as to libel to the effect that "it shall in all cases be incumbent upon the plaintiff to prove malice," a change in the common-law rule which might have proved a most undesirable piece of constitutional legislation, and which was wisely rejected.[1]

The provisions of the American bills of rights on the liberty of the press have been quite generally considered to mean only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship, and not to change the common-law rules as to responsibility for libel. But Cooley considers it to include "not only liberty to publish, but complete immunity from legal censure and punishment for the publication so long as it is not harmful in character when tested by the common-law standards in force when the constitutional guarantees were established and in reference to which they have been adopted,"[2] the phrase "being responsible for the abuse of that liberty" meaning, therefore, subject to the common-law liability for defamation.

[1] At common law malice was conclusively inferred from the falsity and defamatory nature of the charge, unless the defendant established privilege of communication. Chase's Blackstone, p. 683.

[2] Cooley, "Constitutional Limitations," p. 695.

Section 5.[1]—Of the concrete rights to which the colonists by reason of their English descent laid claim, no longer as English subjects, however, but as individuals in a state, one of the most precious and essential was the right of trial by jury. This ancient bulwark of individual liberty whose origin, according to Blackstone, is to be sought as far back as the Saxon colonies, though not firmly established until the abolition of the Saxon trials by ordeal, and the Norman trial by battle, was first formally declared by Magna Charta of King John in 1215 in the king's solemn agreement that no freeman should be hurt in either his person or property, "unless by the legal judgment of his peers or the law of the land." The chief grievance in the Petition of Right of 1628 was the violation of this provision, and among the oppressions of King George III enumerated in the Declaration of Independence was that of depriving the colonists, in many cases, of the benefits of trial by jury. It is no wonder, therefore, that every one of the constitutions of the revolutionary period contained express guarantees of jury trial, a precedent of constitutional practice which has persisted down to the latest constitutions, at least as regards criminal prosecutions for major offenses.[2] Jury trial was also expressly protected in the Northwest Ordinance of 1787.

The Illinois constitution of 1818 contained the simple provision that the right of trial by jury should remain inviolate, but in the constitution of 1848 there was added the stipula-

[1] "The right of trial by jury, as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before justices of the peace, by a jury of less than twelve men may be authorized by law." *Constitution of Illinois*, 1870, Art. ii, Sec. 5.

[2] It is somewhat remarkable that in spite of the reverence of the English for the jury trial, and the great emphasis placed upon it by Blackstone and others, who considered it a right of vital importance, firmly established as a constitutional principle of English jurisprudence by the Great Charter, the United States Supreme Court should have declared that it is not part of "due process" as guaranteed by Amendment XIV of the Federal Constitution. Walker *v.* Sauvinet, 92 U. S., 90.

tion that it should extend to all cases at law, without regard to the amount in controversy, a provision not found in any other state constitutions, in a number of which, indeed, there were mentioned express exceptions to the general requirement of jury trial.

The present constitution, though declaring that the right of trial by jury *as heretofore enjoyed*, should remain inviolate, adds that the trial of civil cases before justices of the peace by a jury of less than twelve men might be authorized by law, which is a direct reversal of the provision in the constitution of 1848, and had previously been embodied in the proposed constitution of 1862. This proviso might, it seems, be regarded as one manifestation of a growing conviction, that the sacred and time-honored trial by jury, however worthy of esteem and respect by reason of its important role in the history of individual liberty in the past, is not altogether above criticism, and that whether by reason of changed external conditions, or because of the manner in which it has come to be administered, the system of trial by jury demands substantial revision to keep it from becoming more and more a clog on the wheels of justice. Considerable evidence of this feeling was found in various motions relating to jury trial introduced in this convention of 1869;[1] one of which proposed to add that a concurrence of three-fourths of a jury should in all cases constitute a verdict. Several other less radical modifications were offered, but one proposal went so far as to authorize juries to return a verdict of "not proven," after which the defendant might again be indicted for the same offence upon additional evidence being discovered.

The guarantee of jury trial "as heretofore enjoyed," means not as enjoyed in 1869 by statute, but as enjoyed by the

[1] Debates of the Convention of 1869, pp. 1567, 1568.

common law of England. This means that in case of a person charged with felony, "a jury of twelve men must be impanelled; the jury must be indifferent between the prisoner and the people; they must be summoned from the vicinage or body of the country in which the crime was alleged to have been committed; they must unanimously concur in the verdict, and the court cannot interfere to coerce them to agree upon a verdict against their convictions." [1] This right to trial by jury cannot be waived in case of felony except by a plea of guilty,[2] but in cases of misdemeanor the defendant may put himself upon the court for trial.[3] This guarantee extending only to cases in which jury trial was required at common law does not extend to cases of contempt proceedings, equity proceedings, statutory proceedings not known to the common law, eminent domain proceedings, etc., in all of which the common-law procedure was not applied.[4]

Section 6.[5]—At common law the citizen was protected against seizure of person or property by very strict rules regarding the issuing of warrants, and immunity in his home against unreasonable searches and seizures was embodied in the maxim that "every man's house is his castle." The desire of the colonists to protect these rights by constitutional provisions is in part traceable to the abuse of executive authority in England in violating these rights in order

[1] George *v.* People, 167 Illinois, 447 (1897).

[2] Morgan *v.* People, 136 Illinois, 161 (1891).

[3] Darst *v.* People, 51 Illinois, 286 (1869).

[4] 184 Illinois, 475; 173 Illinois, 144; 103 Illinois, 367; 23 Illinois, 202.

[5] "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized." *Constitution of Illinois*, 1870, Art. ii, Sec. 6.

to obtain evidence of political offences, which practice was finally overthrown in 1765 by Lord Camden.[1]

In the colonies themselves, moreover, the practice of issuing writs of assistance to the revenue officers, authorizing them to search suspected places at their discretion, had already caused great dissatisfaction ten years before this date, and had been denounced by Otis as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book."[2] This prohibition of general warrants has been characterized as the only constitutional principle to be first established in America and later adopted in England.[3]

The Virginia Bill of Rights of 1776 had contained an express prohibition on general warrants of search and seizure which was incorporated in the constitution of Illinois, 1818, following the declaration that the people should be secure in their persons, houses, papers and possessions from unreasonable searches and seizures. Almost all of the other constitutions in 1818 contained similar provisions, and this section in the Illinois constitution of 1818 was retained without change in the constitution of 1848, at which time all but four of the twenty-eight other constitutions embodied similar provisions.

There was no alteration of this section in the constitution of 1862, but the convention of 1869 changed the phraseology somewhat by adopting almost verbatim the form of the fourth amendment to the federal constitution. At the time of framing the present Illinois constitution there was one state constitution only which did not contain a similar provision, viz., New York, 1846, which still continued under the constitu-

[1] Cooley, "Constitutional Limitations," pp. 424 ff. [2] *Ibid.*

[3] Stimson, "Federal and State Constitutions of the United States," p. 149, n. 10.

tion in force in 1848, when the prior Illinois constitution was adopted.

The purpose of this constitutional prohibition was to establish the common-law rule as to searches and seizures, which had always been extremely jealous of the right of the individual to immunity from such interference with his person and property. Unreasonable searches and seizures are those without warrant properly obtained in cases where the common law required them. But arrests without warrant are not abridged by the constitution where such arrests could be made at common law before its adoption.[1] Probable cause must be shown by the production of evidence satisfactory to the court of such facts as to convince the magistrate that the suspicion is well founded,[2] and to justify the issuing of a warrant the affidavit must state either that the person therein described committed the offence or that the person making the complaint has just and reasonable grounds to suspect, or does in fact suspect, that he is guilty of the offence.[3]

Section 7.[4]—The provision that all persons shall be bailable by sufficient sureties except for capital offences where the proof is evident or the presumption great represents in effect the common-law rule of England as to bail.[5] Since by the concept of the common law every man was regarded innocent

[1] North *v.* People, 139 Illinois, 81 (1891).

[2] White *v.* Wagar, 185 Illinois, 195 (1900).

[3] Housh *v.* People, 75 Illinois, 487 (1874).

[4] "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." *Constitution of Illinois*, 1870, Art. ii, Sec. 7.

[5] Chase's Blackstone, p. 1001.

until proved guilty, it followed also that every man was to be treated with all possible leniency even after arrest for crimes, and that confinement in jail should not be resorted to if the appearance of the accused for trial could be assured in some other way. Hence at common law every man was entitled to be released on bail before conviction upon sufficient sureties, except for capital offences, on charges based on more than a mere suspicion, when indeed the public welfare demanded the highest surety, viz., the custody of the accused himself.

Though the first American Bill of Rights contained no express guarantee of the right to bail, it was impliedly guaranteed in the prohibition against requiring excessive bail, which had been forbidden in England by Statute 1 W. & M. 2, Ch. 1, and in the Northwest Ordinance it had been declared that all persons shall be bailable unless for capital offences where the proof is evident or the presumption great.

The first Illinois constitution guaranteed the right to bail in the terms which have been retained in all three of the later constitutions.[1] About one-half of the constitutions then in force contained similar express guarantees of the right to bail and most of the others impliedly guaranteed it by such provisions as the ones adopted in the Virginia Bill of Rights.

Closely connected with the guarantee of bail is the guarantee of the writ of *habeas corpus*, which was another common-law right of English subjects and was re-affirmed in the Habeas Corpus Act of 1679.[2] This writ which secured to the individual a hearing as to the legality of his imprisonment and which was, and is, characteristic of the English

[1] Illinois is the only state that has no prohibition on excessive bail. Stimson, *supra*, p. 105.

[2] Stubbs, "Select Charters," p. 517.

law alone,[1] was deemed one of the most important of individual rights, and the Habeas Corpus Act was regarded as the "second Magna Charta and stable bulwark of liberties."

In England the privilege of this writ could legally be suspended in cases of evident public necessity, but only upon authority given by Parliament to the Crown. The possibility of such an exigency was provided for in the first Illinois constitution by the provision qualifying the prohibition of suspending the writ, viz., "unless when in cases of rebellion or invasion the public safety may require it."

In the Northwest Ordinance of 1787 the inhabitants of the Territory had been declared to be always entitled to the benefits of the writ of *habeas corpus*, and provisions were found in 1818 in over half of the other state constitutions similar to the one in the first Illinois constitution, which was retained without change in the subsequent constitutions of the state.

Section 8.[2]—The protection against criminal prosecution except after indictment by grand jury, that is, formal accusation by a body of from twelve to twenty-three sworn men of the country, extends even farther back in English criminal procedure than does the right to trial by petit jury, and has been traced to the Hundred Courts of Aethelred.[3] At com-

[1] "There is on the continent nothing corresponding to the constitutional right of any individual when arrested by an officer of the government to demand instant information of the cause of his arrest and to be set at large unless indicted by a grand jury for a crime not bailable or for which the person accused is unable to give satisfactory bail." Stimson, "Federal and State Constitutions," p. 18.

[2] "No person shall be held to answer for a criminal offence, unless on indictment of a grand jury except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, in cases of impeachment and in cases arising in the army or navy or in the militia when in actual service in time of war or public danger: *Provided*, that the grand jury may be abolished in all cases." *Constitution of Illinois*, 1870, Art. ii, Sec. 8.

[3] Stimson, "Federal and State Constitutions," p. 169, note.

mon law indictments or presentments by grand jury were in general required in all cases, though for misdemeanors the method of accusation by information was used as well, especially in cases of misdemeanors that tended to disturb or endanger the government. But this latter species of proceeding was looked upon with great disfavor in England because of its abuse in the times preceding the revolution, and was there later regulated by statute.[1] In America also this accusation by information was very unpopular, though only one of the revolutionary constitutions, viz., North Carolina, 1776, contained any other guarantee of indictment by grand jury than that contained in the provision establishing the English common law as the law of the states.

When, however, the first constitution of Illinois came to be framed, the federal constitution had expressly guaranteed the right to indictment, and seven other states had followed this precedent in their constitutions. The Illinois constitution of 1818 provided that no indictable offence should be proceeded against criminally by information, a principle that went beyond the common-law rule which recognized some kinds of offences that could be proceeded against by either indictment or information. The exceptions recognized in the constitution of 1818 were the same as existed at common law, namely, trial by court martial, and by impeachment, to which proceedings the requirement of grand jury indictment never applied.

In the constitution of 1848 indictment or presentment of a grand jury was required for all offences punished with imprisonment or death, or fine above one hundred dollars, except in cases of impeachment or cases arising in the army or navy or in the militia when in actual service in time of war or public danger. Similar provisions existed at that

[1] Chase's Blackstone, ch. XXI.

time in all but eight of the state constitutions, and of these eight, six were still the early constitutions adopted before the first Illinois constitution. Of the two others, one was that of the civil law state of Louisiana, and the other was that of Virginia, which had retained its original Bill of Rights of 1776 in its second constitution.

It appears, therefore, that the indictment by grand jury came to have growing importance in the American bills of rights in the thirty years between the framing of the first and second Illinois constitutions, and in the proposed constitution of Illinois of 1862 there was embodied the same guarantee.

But in the Illinois convention of 1869 there was evidenced considerable opposition to the grand jury system. Some motions suggested a reduction in the total number of grand jurymen, or in the number required for a finding, and some advocated the abolition of the grand jury with power in the legislature to re-establish it, while others, more extreme, went to the length of demanding complete abolition.[1] Several speeches in strong denunciation of the evils of the grand jury system were delivered while others as warmly defended it.[2] This agitation terminated finally in the proviso now found in section 8, to the effect that the grand jury may be abolished by law in all cases, leaving the advisability of abolishing this ancient system to be determined by the legislature, which that body in the forty years since the authority was conferred upon it has not seen fit to do.[3] It is interesting to note that of the twenty-four state constitutions which in 1870 expressly guaranteed indictment by grand jury,

[1] Debates of the Convention of 1869, p. 174.

[2] *Ibid.*, pp. 1434–1438, 1440–1442.

[3] Recent evidence of continued opposition to the grand jury system is furnished by the introduction into the last two sessions of the Illinois legislature of bills to abolish the system.

Illinois was the only one that permitted it to be abolished by the legislature, although Indiana, which, however, had not expressly protected it, had in 1851 adopted a similar provision.[1]

In Illinois, under the present constitution, what was practically the common-law rule as to grand jury indictment is confirmed. Indictment is essential to the legal prosecution of persons charged with crime punishable by penitentiary imprisonment,[2] and where conviction would result in disqualification to hold public office,[3] but not to hold persons to answer for misdemeanors.[4] The proviso at the end of the section virtually authorizes the legislature to change a constitutional provision, but that its effect is not, as might at first appear to be the case, to nullify the whole section would seem to be shown by the reluctance evidenced by the subsequent legislatures of Illinois to alter a system which the constitution of the state evidently wished to favor.

Section 9.[5]—The rights of the accused in criminal prosecutions guaranteed by this section were for the most part rights to which English subjects were entitled by the common law and which were considered essential attributes of personal liberty and security. So at common law an indictment could not be tried unless the defendant personally appeared. So also the

[1] Constitution of Indiana, 1851, Art. vii, sec. 17.

[2] Paulsen *v.* People, 195 Illinois, 507 (1902).

[3] People *v.* Kipley, 171 Illinois, 44 (1897).

[4] Brewster *v.* People, 183 Illinois, 143 (1899).

[5] "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and to have a copy thereof; to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." *Constitution of Illinois*, 1870, Art. ii, Sec. 9.

defendant was entitled to the assistance of counsel as to the matters of law arising on the trial. As to other matters the defendant was not entitled to counsel, on the principle that the judge should be counsel for the prisoner and see that the proceedings against him were legal and strictly regular. But Blackstone rightly speaks of this latter rule as "not at all of a piece with the rest of the humane treatment of prisoners by the English law" and states that the judges never scrupled to allow a prisoner the assistance of counsel to instruct him what questions to ask or even to ask questions for him, with respect to matters of fact.[1]

When the prisoner was arraigned, the indictment, which contained in great detail all matters bearing on the accusation, was read to him that he might fully understand his charge, which was all that was necessary at a time when the general inability to read, especially among the criminal classes, made a requirement of a copy for the defendant superfluous.

The right to meet the witnesses for the prosecution and to question them was also a common-law right, though the defendant had no right by the early rule to introduce witnesses in his own behalf in capital cases.[2] But by Statute 1 Ann. 2, ch. 9, it was declared that in all cases of treason and felony all witnesses for the prisoner should be examined upon oath in like manner as the witnesses against him. Finally the right to a trial by a jury of the county where the fact was committed was also recognized by the common law and insisted upon as one of the greatest protections for the accused, based on the early theory that the jurors were witnesses, and themselves cognizant of the commission or non-commission in their midst of the act charged.

The Virginia Bill of Rights enumerated substantially all

[1] Chase's Blackstone, p. 1025.

[2] *Ibid.*, p. 1028.

of these rights of the accused, and all but three[1] of the constitutions in force when Illinois became a state contained express provisions of a similar nature. The first constitution of Illinois declared the rights of the accused in practically the same terms found in the present constitution, and no material change was made in the second constitution. The right of the defendant to compel the attendance of witnesses in his favor had been protected in two-thirds of the constitutions then in force. The present constitution contains the additional provision that the accused have the right to a copy of the accusation, a right guaranteed in nine other constitutions in force in 1870. In the convention of 1869 it was suggested to guarantee to the defendant the right to have his counsel close the argument to the jury, and also to make non-freeholders incompetent as jurors, if objected to on that ground, but otherwise no changes in the provisions of the former constitutions were proposed.

The provisions of the present constitution, like the requirements of the common law in this respect, refer only to *nisi prius* trials, that is, not to appeals or other proceedings of review in higher courts.[2] The presence of the accused, though essential in cases of felony, is not necessary at the trial of mere misdemeanors,[3] and may in this latter case be waived by him.

The right to appear by counsel includes the right to have one's counsel allowed a reasonable time for argument.[4]

The purpose of requiring a copy of the accusation is to secure such specific designation of the offence charged as to enable the defendant to prepare fully for his defence and to

[1] Georgia 1798, New Jersey 1776, South Carolina 1776.

[2] Fielden *v.* People, 128 Illinois, 595 (1889).

[3] Bloomington *v.* Heiland, 67 Illinois, 278 (1873).

[4] White *v.* People, 90 Illinois, 117 (1878).

plead the judgment in bar of a subsequent prosecution for the same offence.[1]

The right to meet the witnesses face to face excludes all evidence by deposition in criminal trials, with the single exception of dying declarations.[2]

The right to a speedy trial guarantees against arbitrary and oppressive delays only, not such as are due to congestion of cases on the docket,[3] and the requirement of a public trial is not violated when the doors of the court room are closed for a temporary purpose during the trial of a criminal case if not for the purpose of excluding anyone connected with the trial.[4] The guarantee of an impartial jury means a jury impartial in the sense in which that term was understood at common law,[5] that is, chosen under the safeguards with which the common law surrounded the choice of jurors.[6] Finally, the requirement of a jury of the county or district may be waived by the defendant by asking a change of venue.[7]

Section 10.[8]—In the same category with the rights of the accused protected in the preceding section is the freedom from self-incrimination and from double jeopardy, which was also carefully protected by the rules of the common law. Firstly, it was an established rule of evidence that confessions were not admissible as evidence unless they were freely

[1] West *v.* People, 137 Illinois, 189 (1891).

[2] Starkey *v.* People, 17 Illinois, 17 (1855).

[3] Weyrich *v.* People, 89 Illinois, 90 (1878).

[4] Stone *v.* People, 3 Illinois, 326 (1840).

[5] Coughlin *v.* People, 144 Illinois, 140 (1893).

[6] See Chase's Blackstone, ch. xxv.

[7] Weyrich *v.* People, 89 Illinois, 94 (1878).

[8] "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." *Constitution of Illinois*, Art. ii, Sec. 10.

given without fear of harm or hope of favor, and a confession obtained by compulsion, though used when the trial by ordeal and other inquisitorial trials were still in force, was not admissible in the later common-law prosecution of crimes. Says Cooley,[1] "A peculiar excellence of the common law system of trial consists in the fact that the accused is never compelled to give evidence against himself."

So also of the protection against double jeopardy, Blackstone says[2] it is a "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence," and in every case the defendant might plead former jeopardy in bar of the accusation.

The guarantee against being compelled to give evidence against oneself was put into the Virginia Bill of Rights and into all but four of the other constitutions in force prior to 1818, including the federal constitution. But the protection against double jeopardy was found in only one-half of those same constitutions, not having been inserted into the prototype of the early bills of rights. In the first Illinois constition both of these provisions were embodied and they have remained in the same terms down to the present constitution, being adopted by the convention of 1869 from the former constitutions without comment. Both guarantees existed in almost all the other constitutions in force in 1870.

The constitutional protection against self-incrimination means that neither a witness nor the defendant in a criminal case need answer any question the answer to which will expose him to any penalty, fine, forfeiture, or punishment, or which will have a tendency to accuse him of any crime or misdemeanor, or to expose him to any penalty or forfeiture,

[1] "Constitutional Limitations," ch. x, 442.

[2] Chase's Blackstone, p. 1019.

or which would be a link in a chain of evidence to convict him of a criminal offense.[1] But this privilege is personal to the witness and he may waive it without consent of the defendant.[2] Furthermore, this constitutional privilege cannot be claimed if by reason of an immunity statute the evidence obtained under compulsion can in no way be used as a basis in aid of a prosecution which might result in fine, imprisonment, penalty, or forfeiture.[3]

The protection against double jeopardy means that no person shall twice be put in peril of conviction for the same act and offense,[4] and whether two indictments are for the same offense must be determined by an inspection and comparison of the indictments.[5] If the facts charged in the second indictment would have sustained a conviction under the first indictment, the plea of former jeopardy is good,[6] but where the facts charged in the second indictment would not, if proved, have warranted conviction under the first, the plea of former jeopardy cannot be maintained.[7]

The verdict itself forms the bar to subsequent prosecution for the same offense though there is no judgment on it,[8] but where judgment of conviction is arrested or reversed at the instance of the accused he will not in legal contemplation have been in jeopardy, but may again be put on trial for the

[1] Lamson *v.* Boyden, 160 Illinois, 613 (1896).

[2] Samuel *v.* People, 164 Illinois, 379 (1897).

[3] People *v.* Butler St. Foundry, 201 Illinois, 236 (1903). The immunity clause in the act here in question was as follows: "*Provided* that no corporation etc. .....shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act or truthfully disclosed in any testimony elicited in the execution thereof." 201 Illinois, p. 243.

[4] Freeland *v.* People, 16 Illinois, 380 (1855).

[5] Durham *v.* People, 5 Illinois, 172 (1843).

[6] *Ibid.*

[7] Guedel *v.* People, 43 Illinois, 226 (1867).

[8] Hankins *v.* People, 106 Illinois, 628 (1883).

same offense.[1] So also if the jury is discharged in case of disagreement, the former jeopardy will not be available as a plea to a new trial.[2]

When the same act constitutes several offenses, trial and punishment for one will be no bar to a prosecution for the others growing out of the same transaction.[3] So for instance, where one single act violates a local ordinance, a state law, and a law of the United States, there are three distinct offenses which are punishable as such. Similarly in case of an act which is both a contempt of court and an indictable crime, the indictment and the proceeding for contempt are entirely distinct and neither will be a bar to the other.[4]

Section 11.[5]—Of the three provisions in the next section, the first one, requiring that all penalties shall be proportioned to the nature of the offence, can be found in England as early as Magna Charta, where it is declared that "a freeman shall not be amerced for a small offence, but according to the degree of the fault and for a great crime in proportion to the heinousness of it."[6] The spirit of this prohibition was expressed in the early American constitutions either by a provision like that in the English Bill of Rights against excessive fines and cruel and unusual punishments,[7] found in the Virginia Bill of Rights and in the

[1] Gerhard *v.* People, 4 Illinois, 362 (1842).

[2] Dryer *v.* People, 188 Illinois, 40 (1900).

[3] Trausch *v.* Cook County, 147 Illinois, 534 (1893).

[4] Beattie *v.* People, 33 Illinois Appeals, 651 (1889).

[5] "All penalties shall be proportioned to the nature of the offense; and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same." *Constitution of Illinois*, 1870, Art. ii, Sec. 11.

[6] Magna Charta, Cap. 20, Stubbs "Select Charters," p. 299.

[7] This prohibition had already been anticipated in the Massachusetts Body of Liberties, clauses 43, 45, and 46. Stimson, "Federal and State Constitutions," p. 22.

federal constitution, or by a requirement that all penalties shall be proportioned to the nature of the offence, as in the Illinois constitution of 1818. In one or the other of these two forms this early provision of Magna Charter existed in over half the constitutions in force in 1818, and Article V of the Northwest Ordinance had provided that "all fines shall be moderate and no cruel or unusual punishments shall be inflicted."

The second provision, to the effect that no conviction should work corruption of blood or forfeiture of estate, is directed against the common-law rule that descent could not be traced through a person convicted of treason or felony, and that his real and personal property were, therefore, forfeited; the former to the lord of the fee, the latter to the king. These incidents of treason and felony prevailed from the earliest time, and had their source in the feudal theory that property, especially realty, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by breach of these conditions.[1] This prohibition was not found in the earliest Bill of Rights nor in the federal constitution, and when the first Illinois constitution was framed, only three other constitutions contained the prohibition exactly, though four others contained it in modified form.

The last provision in this section forbidding deportation for crime committed within the state was occasioned by the English statutes just prior to the American Revolution, making deportation a substantive punishment. The punishment was unknown at common law, and in 1679 the Habeas Corpus Act had forbidden the deportation of English subjects as prisoners out of the kingdom.[2] It was introduced as a condition of pardon in case of crimes excluded

[1] Stephen, "History of the Criminal Law of England," vol. i, p. 487.

[2] Stubbs, "Select Charters," p. 52.

from clergy,[1] and by reason of statutes passed in the eighteenth century, had become part of the law of the colonies upon their separation from England. This provision was, however, very rare in the early constitutions and in 1818 only three of the eighteen then existing state constitutions contained such a prohibition.[2]

All three of the above provisions were adopted in the constitution of 1848, though the committee on the bill of rights omitted all mention of the first two in its report. In the constitution of 1870 these same stipulations were retained without change, though it was suggested among other changes to add that the death penalty should never be inflicted.[3]

The question whether the imposition in a particular instance of a punishment, though authorized by the legislature, violates the requirement that penalties should be proportioned to the nature of the offense is, of course, left to the discretion of the court. But it is a discretion to be judicially exercised and there may be cases in which a punishment, though within the limits fixed by a statute, is so clearly excessive as to be in violation of this constitutional requirement.[4]

But whether the penalty imposed by statute on a crime is excessive *per se*, is a matter primarily for legislative discretion. When the legislature has authorized a designated punishment for a specified crime, the court will not hold it invalid, unless it is a cruel or degrading punishment not known to the common law, or a degrading punishment which had become obsolete in the state prior to the adoption of its

[1] Stephen, *supra*, pp. 480, 487.

[2] Mississippi 1817, Ohio 1802, Vermont 1793.

[3] Debates of the Convention of 1869, p. 1573.

[4] Cooley, "Constitutional Limitations," p. 471.

constitution, or is so wholly disproportioned to the offence as to shock the moral sense of the commmunity.[1]

An act imposing the forfeiture of all franchises of a corporation as a penalty for any violation of the prohibition of the act on discriminating freight rates was held to contravene this provision of the constitution.[2] But providing an increased penalty for a second offence is not imposing a disproportionate penalty, for repetition of the offence aggravates the guilt.[3]

Section 12.[4]—Imprisonment for debt was one of the great defects of the common law from the earliest times until well into the nineteenth century in England, and existed in most of the American colonies for many years, though somewhat mitigated by insolvent laws. But the absurdity and injustice of imprisoning honest debtors was pretty generally realized by 1776, when the first American constitutions were being framed, and seven of the state constitutions in force when Illinois became a state embodied a prohibition against imprisonment for debt, in the absence of fraud, as one of the guarantees of individual liberty.[5] The constitution of 1848 and the proposed constitution of 1862 retained this provision from the earliest constitution, and no change was made in the section when adopted into the present Illinois constitution.

[1] People *v.* Illinois State Reformatory, 148 Illinois, 413 (1894).

[2] C. & A. R. R. Co. *v.* People, 67 Illinois, 11 (1873).

[3] Kelly *v.* People, 115 Illinois, 583 (1886).

[4] "No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law; or in cases where there is strong presumption of fraud." *Constitution of Illinois*, 1870, Art. ii, Sec. 12.

[5] This principle had already been embodied in the Massachusetts Body of Liberties, 1641, in the provision that no man should be imprisoned for debt if the law could find competent means of satisfaction otherwise from his estate. Stimson, "Federal and State Constitutions," p. 23.

This constitutional guarantee is confined to actions upon contracts express or implied, and does not apply to liabilities for torts [1] nor to fines or penalties arising from a violation of the penal laws of the state,[2] and a court cannot commit for contempt in not obeying a decree to pay money unless the refusal is wilful and not caused by financial inability.[3]

Section 13.[4]—The right of eminent domain, that is, the power of the state to appropriate to its own use or to that of its agents private property of its citizens needed for public purposes, is inherent in sovereignty, and is as old as government itself. In early times, moreover, the duty of the state to compensate the individual for property so taken was not recognized, and even in England private property was frequently taken for the use of the crown without compensation.[5] But Blackstone in discussing the limitations on the absolute right of private property declares that the legislature alone can act in the exercise of the power of eminent domain, and that only by giving the individual so deprived a full indemnification and equivalent for the injury thereby sustained.[6] Eminent domain differs from taxation in that in the former case the citizen is compelled to surrender to the public something beyond his due proportion for the public

[1] Rich *v.* People, 66 Illinois, 513 (1873).

[2] Kennedy *v.* People, 122 Illinois, 649 (1887).

[3] Blake *v.* People, 80 Illinois, 11 (1875).

[4] "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken." *Constitution of Illinois*, 1870, Art. ii, Sec. 13.

[5] White, "Constitution of Pennsylvania," ch. xxvi.

[6] Chase's Blackstone, p. 79.

benefit. It is a primary requisite, therefore, in the appropriation of lands for public purposes that compensation shall be made therefor.[1]

As this power of eminent domain does not depend upon constitutions but exists independently of them, inherent in sovereignty, no affirmative declaration of the power was requisite in the framing of our American constitutions. But to guard against abuse of the power by the sovereign through its agents it was felt necessary to embody some limitations thereof in the fundamental law of the state. The Virginia Bill of Rights did not contain such a provision nor did any of the other constitutions of that year which were modeled after it. But the Northwest Ordinance had provided for compensation, and when Illinois in 1818 first framed a constitution, one-half of the state constitutions then in force contained some limitation of the power of eminent domain.

In the first Illinois constitution it was provided that no man's property should be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him, which still showed the distrust of executive usurpation of power so strongly experienced by the American colonists in 1776. In the first draft of the Illinois constitution submitted to the convention it was provided that compensation should be *previously* made, which condition had not formerly been considered essential to the validity of the exercise of the power, at least not when exercised by the state itself.[2] But this suggestion was not at that time adopted.

No change was made in the provision regarding eminent domain in the constitution of 1848, but important changes were made in the present constitution of 1870. In the first place, while it had been the universal rule that the com-

[1] Cooley, "Constitutional Limitations," p. 812. [2] *Ibid.*, p. 813.

pensation awarded was to be measured by the value of the property taken and the direct injury to the owner from the loss, so that any proper exercise of the powers of government which did not directly encroach upon the property of an individual or disturb him in his possession or enjoyment would not entitle him to compensation, it was now provided for the first time in any state in the Union, that private property should not be taken *or damaged* for public use without just compensation.

This important innovation was not adopted without considerable discussion and some opposition in the convention of 1869, mainly on the ground that by departing from the settled rules relating to eminent domain there was no certainty as to where the courts might stop in the application of this new provision, resulting perhaps in making it impossible to carry out certain important public improvements because of the extent of damages to be paid to private owners. But this eminently just and reasonable provision was retained and has been copied in a number of the state constitutions adopted since that time.[1]

Another important change introduced in the constitution of 1870 with respect to the right of eminent domain, was the provision as to the manner of ascertaining the compensation due. Under the former constitutions it was left with the legislature to fix the manner of determining such compensation. What the tribunal shall be which is to assess the compensation must be determined either by the constitution or by the statute which provides for the appropriation, for the exercise of the right of eminent domain is not one where, as a matter of right, the party is entitled to trial by jury.[2]

But the proceeding being judicial in character, the party in interest is entitled to have an impartial tribunal and the

[1] Cooley, "Constitutional Limitations," p. 810. [2] *Ibid.*, p. 817.

usual rights and privileges which attend judicial investigations, and the convention of 1869 felt that jury trial was the best manner of securing such impartial investigation, in cases where the right was not being exercised by the state itself.[1] It was first proposed to provide for an alternative body of three commissioners, appointed by a court of record, to ascertain the compensation, which was the method of assessing such compensation under the existing statutes. But this provision was stricken out of the committee report by the convention, many members of which were in favor of prescribing even more minutely the process to be followed in assessing compensation by a jury. It was again variously suggested to require compensation to be *first* made, and further, several resolutions were introduced with a view to prohibiting the deduction of benefits from the compensation to be awarded. This latter proposition aroused much discussion, being regarded by some as essential to a just exercise of the power of eminent domain, and by others as itself most unjust and unreasonable. The general expression of sentiment was, however, distinctly in favor of such a limitation, and it was in fact adopted by the convention, but upon re-referment to the committee was finally omitted.[2]

Various other resolutions and motions relative to the right of eminent domain were introduced, there being more discussion of this section of the bill of rights than of any other, principally due to what were considered the abuses of this right by the public-service corporations, especially the railroads which had of late been making such large use of the power. But the convention as a whole realized the wisdom of leaving the matter of detailed regulation of the power to

[1] This provision was taken from the Constitution of New York 1846, and was found elsewhere only in the constitutions of Iowa 1857, Michigan 1850, and Ohio 1851.

[2] Debates of the Convention of 1869, pp. 1575 ff.

the legislature, and rejected the more radical suggestions, one of which went so far as to provide that no man should be deprived of his property in any case against his consent.[1]

The provision that the fee of land taken for railroad tracks without the consent of the owners thereof should remain in such owners, subject to the use for which it is taken was also unique in the constitution of Illinois. Its purpose was to prevent private property from being taken and retained by railroad corporations and turned to other uses when no longer needed for the purpose for which it was taken.

It appears, therefore, from the debates of the convention that this whole question of the right of eminent domain and its manner of exercise was considered a question of fundamental importance which had not been satisfactorily dealt with in the past, and which required further action, but the diversity of views as to the changes to be made resulted in a great deal less radical alteration in the wording of this important section, than would have suited many members of the convention.

Since the right of eminent domain exists in every government, independently of constitutional grant, on the ground of necessity, no legislative bargain in restraint of the complete, continuous, and repeated exercise of this right is valid or within the protection of the obligation of contracts in either the federal or state constitutions.[2]

Private property in this connection has been defined as that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects generally, to the exclusion of others.[3] Every species of property which the public needs may require and

[1] Debates of the Convention of 1869, p. 429.

[2] Village of Hyde Park *v.* Cemetery Association, 119 Illinois, 141 (1886).

[3] I. C. R. R. Co. *v.* Commissioners of Highways, 161 Illinois, 244 (1896).

which government cannot lawfully appropriate under any other right is subject to be seized and appropriated under the right of eminent domain, in fact legal and equitable rights of every description, except money or those rights in action which can only be available when made to produce money.[1]

Under the present constitution, as seen, not only the taking of private property but the damaging as well must be compensated for. Prior to the constitution of 1870, recovery could be had only for direct physical injury to property, as by overflowing it, depositing materials upon it, etc., and so interference with the ingress to or egress from property was not required to be compensated for. But under the new provision compensation is to be allowed in all cases, where but for some legislative enactment, an action would lie at common law, for tort to property.[2]

The question of what constitutes a public use, has frequently arisen in the courts, but no definite rule can be laid down. The necessity or expediency of putting private property to a certain use, is a question wholly for the legislature, though the question whether such use is public or private, will be reviewed by the courts.[3] The ordinary functions of government are, of course, clearly public uses, but even private undertakings may embody a public use, as in the case of so-called public service or public utility corporations.[4]

The construction of drains, ditches, and levees by landowners for agricultural, sanitary, or mining purposes across the lands of others, especially authorized by constitutional

[1] Cooley, "Constitutional Limitations," pp. 756 ff.

[2] Rigney *v.* Chicago, 102 Illinois, 64 (1882).

[3] Dunham *v.* Village of Hyde Park, 75 Illinois, 371 (1874).

[4] Chicago R. I. and Pac. R. R. *v.* Joliet, 79 Illinois, 25 (1875).

provision,[1] is also subject to the conditions imposed on the exercise of the right of eminent domain. Sewerage and other works necessary for the abatement of public nuisances come within the meaning of a public use[2] whether constructed by public authorities or by private companies.

"Just compensation" means compensation to such amount as is under all the circumstances a fair and full equivalent for the thing taken,[3] or a reimbursement for real, as distinguished from merely speculative damages.[4]

The requirement of a jury in this section embraces all the provisions of section 5 and permits therefore a jury of six to be authorized in trials before justices of the peace.[5] So also the jury must be one in the selection of which the party in interest has had an opportunity to participate.[6]

In general, since the right of eminent domain, necessary and undisputed though it be, is, nevertheless, a compulsion on the individual to sell his property, involuntarily, it must not be abused, and in its exercise the limitations prescribed by the constitution should be strictly observed, and the statutes passed in pursuance thereof should be strictly complied with.[7]

Section 14.[8]—*Ex post facto* laws, that is, retroactive criminal laws were considered at common law also as cruel and

[1] Constitution of Illinois, 1870, Art. iv, Sec. 31.

[2] Jacksonville *v.* Lambert, 62 Illinois, 519 (1872).

[3] Phillips *v.* Town of Scales Mound, 195 Illinois, 353 (1902).

[4] R. R. Co. *v.* City of Pontiac, 169 Illinois, 155 (1897).

[5] McManus *v.* McDonough, 107 Illinois, 95 (1883).

[6] W. R. R. Co. *v.* Drainage District, 194 Illinois, 310 (1902).

[7] Ayer *v.* City of Chicago, 149 Illinois, 262 (1894).

[8] "No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed." *Constitution of Illinois*, 1870, Art. ii, Sec. 14.

unjust.[1] The principle that all laws adversely affecting private rights should be made to commence *in futuro* was a fundamental principle of sound legislation in England and has been a basic doctrine of our American constitutional law from the very first. Retroactive laws, whether *ex post facto* laws or laws impairing the obligation of contracts, that is, whether criminal or civil, were ever contrary to the spirit of our institutions under which life, liberty, and property are most jealously safeguarded. The Virginia Bill of Rights, it is true, did not embody a prohibition on such laws, but the Northwest Ordinance had forbidden laws violating contract rights and the great majority of states had by 1818 adopted such provisions in their constitutions, besides the provisions on this point in the United States constitution.

The federal constitution, it must be remembered, not only forbids Congress to pass *ex post facto* laws, but expressly forbids the states also to pass either *ex post facto* laws or laws impairing the obligation of contracts. The insertion of these provisions—and the same was also true of the state guarantees of due process after the adoption of amendment XIV of the federal constitution—into the first constitution of Illinois could, therefore, be of effect only in broadening the protection which the interpretation of the federal provision by the United States courts might supply. That is, any state act which federal courts would consider contrary to either of these prohibitions as contained in the federal constitutions would be wholly bad, whether or not the state courts might consider it as not violating the identical provision in the state constitution. On the other hand, however, a state act sustained by the federal courts as not contrary to these prohibitions in the federal constitution might still be invalidated by the state courts as violating their interpretation of the same words in the state constitution.

[1] Chase's Blackstone, p. 10.

Both of these guarantees were, however, continued in the later constitution of Illinois, and adopted in the constitution of 1870 practically without discussion, being found at that time also in about two-thirds of the other state constitutions.

The prohibition on making any irrevocable grant of special privileges or immunities was new in the present constitution of Illinois, but very little discussion of this provision took place on the floor of the convention, notwithstanding that it could be found in only two other constitutions of that time.[1] The indiscriminate granting of valuable franchises, in corporate charters, made it necessary, under the ruling in the Dartmouth College case [2] that such charters are contracts, to protect the public against corrupt or indifferent legislative bodies, by providing in the fundamental law of the state that such grants could not be irrevocably made.

In the convention of 1869 it was moved, with a view to remedying the mistakes of the past, as well as to providing protection in the future, that any amendment made to existing charters of corporations should subject them to future legislation, that is, withdraw them from the protection of this provision, but this motion was not reported out by the committee to which it was referred.

Ex post facto laws are defined in Illinois to be those by which, after an act indifferent in itself has been committed, the legislature declares it to have been a crime and makes it punishable,[3] or those which change punishments to the prejudice of the defendant after the commission of the crime.[4]

[1] Kansas 1857, Ohio 1851.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

[3] Coler *v.* Madison Co., 1 Illinois, 154 (1826).

[4] Johnson *v.* People, 173 Illinois, 131 (1898). The meaning and scope of the federal prohibition on the passage of *ex post facto* laws which is directed to the state legislature as well as to the National Congress was considered at length in the case of Calder *v.* Bull, 3 Dall., 386 (1798).

The entire deprivation of a remedy on a contract, is a violation of the protection hereby guaranteed, but the modification or substitution of a remedy is not,[1] nor is the changing of the rules of evidence an impairment of a vested right.[2] Limitation laws are not bad even if affecting existing rights, if a reasonable time is given for the assertion of the right before the bar takes effect.[3] The legislature may enact retrospective statutes to validate invalid contracts, or ratify acts which it might have authorized in the first place, if no vested rights will be infringed.[4]

Charters of private corporations are contracts under the Illinois constitution[5] as well as under the federal constitution, and are subject to only a reasonable exercise of the police power of the state,[6] that is, to the inherent inalienable right to make all reasonable regulations in the interests of public safety, welfare, health, and comfort. So even exemption from taxation by charter is a contract binding on the state,[7] although the taxing power is a fundamental attribute of government.

Sections 15 and 16.[8]—The necessity of having the military in subordination to the civil power, and the evils of any other relation between the two arms of government, had been

[1] Newkirk *v.* Chapron, 17 Illinois, 344 (1856).

[2] Roby *v.* Chicago, 64 Illinois, 447 (1872).

[3] Bradley *v.* Tightcap, 201 Illinois, 511 (1903).

[4] Scammon *v.* Commercial Co., 6 Illinois Appeals, 551 (1880).

[5] Bruffet *v.* Great Western R. R. Co., 25 Illinois, 349 (1861).

[6] Ruggles *v.* People, 91 Illinois, 256 (1878).

[7] Illinois C. R. R. *v.* Goodwin, 94 Illinois, 262 (1880).

[8] "The military shall be in strict subordination to the civil power."

"No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war, except in the manner prescribed by law." *Constitution of Illinois*, 1870, Art. ii, Secs. 15 and 16.

early felt in England, and a formal request for remedying the abuses of the military power was embodied in the Petition of Right of 1628 to Charles I. in which it was demanded that the soldiers and sailors quartered on the inhabitants in time of peace be removed, and that the proceedings by martial law instead of by civil law be suppressed.[1] Again in the Bill of Rights of 1689 Parliament expressly forbade the raising or keeping of a standing army within the kingdom in time of peace without its consent.[2]

In the period prior to the American Revolution, moreover, the colonists had suffered their own experience of the evils of having standing armies quartered upon them, and of interference with the regular course of justice, and in the Declaration of Independence among the oppressions there described, were the keeping of standing armies in times of peace among the colonies without the consent of their legislatures, the quartering of large bodies of armed troops among them, and generally the rendering of the military independent of and superior to the civil power.

The Virginia Bill of Rights, therefore, embodied a provision forbidding standing armies in time of peace, and subordinating the military power to the civil power, in all cases, as did also most of the other revolutionary constitutions. Notwithstanding the fact that these provisions were very common at the time when the first Illinois constitution was framed, no mention of them is contained in that document. But in the constitution of 1848, following the precedent of all but three of the twenty-eight constitutions then in force, the section subordinating the military to the civil power was inserted, and the present prohibition against quartering soldiers, found also in almost as many of the other constitutions of the time, was added.

[1] Stubbs, "Select Charters," p. 516. Petition of Right, ch. x.

[2] *Ibid.*, p. 524. Bill of Rights, clause 6.

Section 17.[1]—Though the right of the people in a free government, peaceably to assemble and to petition the government for redress of grievances, is one which results from the very nature and structure of its institutions, it was nevertheless subjected to repeated attacks by the crown in England. The right of petition, though now regarded as a simple, primitive, and natural right, was, even as late as the reign of James II., sought to be denied in the famous trial of the seven bishops for having attempted to exercise this right, and it was therein finally vindicated by their acquittal.[2] The English Bill of Rights of 1689, therefore, after reciting the illegal prosecution of these petitioners to the crown, declares that it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitioning are illegal.[3]

This right was generally expressly protected in the early constitutions, though Story regards it as unnecessary to be expressly provided for,[4] and the earlier constitutions of Illinois guaranteed it in virtually the same terms as are now found in this section of the present Illinois constitution.

Section 18.[5]—The English Bill of Rights had declared that the election of members of parliament ought to be free,[6] and this principle of free and equal elections was again expressly declared in the first American Bill of Rights about a century

[1] "The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances." *Constitution of Illinois*, 1870, Art. ii, Sec. 17.

[2] Cooley, "Constitutional Limitations," p. 497.

[3] Stubbs, "Select Charters," p. 623.

[4] Story on the Constitution, sec. 1894.

[5] "All elections shall be free and equal." *Constitution of Illinois*, 1870, Art. ii, Sec. 18.

[6] Stubbs, "Select Charters," p. 525.

later. The early constitutions in this country pretty generally followed the example of Virginia in this regard, and when in 1818 Illinois expressly guaranteed the freedom and equality of elections, she adopted the practice prevailing in more than half of the existing constitutions.

The provision as found in the early Illinois constitution was retained verbatim both in the constitution of 1848 and in the present constitution of 1870. Just what practical effect would be given to this section by the Illinois courts does not appear, but its general purpose undoubtedly is to keep every election free of all influences and surroundings which might bear improperly upon it or might impel the electors to cast their votes otherwise than as their judgments would dictate.[1]

Section 19.[2]—This general declaration of the protection which should be found in the law is practically an epitome of the theory of the common law, and was formulated in substance as early as the thirteenth century in the Great Charter of English Liberties.[3] Chapter 40 of Magna Charta of King John declares "we will sell to no man, we will deny no man, or defer right or justice," asserting a principle which has remained fundamental in the English law from that time to the present, and which had been guaranteed in over half the state constitutions in force when Illinois was admitted to the Union.

The statement of this principle in the first Illinois consti-

[1] Cooley, "Constitutional Limitations," p. 922.

[2] "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation; he ought to obtain by law, right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay." *Constitution of Illinois*, 1870, Art. ii, Sec. 19.

[3] Stubbs, "Select Charters," p. 301.

tution was adopted without substantial change in both of the later constitutions of Illinois, and stands in our present constitution little different from its first annunciation seven centuries ago.

Under this provision of the constitution every man has the right to call upon the courts to protect him in his person, property, and reputation, and that, too, without reference to whether other persons are also suffering from the same cause.[1]

The right of an elector to have the person who has been lawfully elected established in his office is not a right the violation of which is an injury to his person, property, or reputation within this provision of the constitution, and cannot therefore be enforced through the courts in absence of a statute conferring such jurisdiction on them.[2]

But a statute requiring a plaintiff to show that he has paid all taxes, due and assessed, on a lot before he can question the validity of a tax title is repugnant to this provision of the constitution, in that it compels him to buy justice.[3]

Section 20.[4]—As a fitting conclusion to the foregoing enumeration of the fundamental principles of government is added this declaration of the necessity of a frequent recurrence to these principles for preserving the blessings of liberty. Similar declarations were found in six of the early state constitutions and in the first constitution of Illinois from which the provision was continued without change in the subsequent constitutions of the state.

[1] Wylie *v.* Elwood, 34 Illinois Appeals 244 (1889).

[2] Douglas *v.* Hutchinson, 183 Illinois, 327 (1899).

[3] Reed *v.* Tyler, 56 Illinois, 288 (1870).

[4] " A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." *Constitution of Illinois* 1870, Art. ii, Sec. 20.

Such, then, are the principles, in their origin, development, and application, which now stand as part of the fundamental law of the commonwealth of Illinois; the resultants of a large number of factors of varying influence and importance. The manifest qualities of the common law, its no less apparent defects, the doctrines of political theorists, the necessities of political exigencies, ancient constitutional principles and modern political developments, all played some part in formulating the body of declarations contained in the present bill of rights; an enumeration of individual rights, on the one hand, comprehensive enough to provide an adequate guarantee of personal liberty, without, on the other hand, entering into undue philosophical speculation or unwise legislative detail.

ARTICLE III.

THE DISTRIBUTION OF POWERS.[1]

The doctrine of a separation of governmental powers so emphatically laid down in this article of the constitution of Illinois was one that had come to be an integral part of American political theory in the earliest period of our constitution making.[2] The doctrine in a somewhat different form may be found as far back as the political writings of the Greeks and Romans, though never substantially exemplified in those governments. For many centuries thereafter, no clear distinction was observed between the powers we now classify as legislative, executive and judicial, and the middle of the seventeenth century in England saw the first recognition of this doctrine as a political theory.

John Locke in his political writings of that time strongly advocated the separation of legislative and executive powers, including as a third class, the federative powers which consisted in substance of the diplomatic powers. Like some modern publicists he did not regard the judicial power as a separate independent power.[3] In France, in the next

[1] "The powers of the government of this state are divided into three distinct departments—the Legislative, Executive and Judicial; and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." *Constitution of Illinois*, 1870, Art. iii.

[2] For a more extended historical consideration of this doctrine see Bondy "Separation of Governmental Powers," Columbia University Studies, vol. v, pp. 144 ff., and also a comprehensive collection of references in Garner, "Introduction to Political Science," ch. xiii.

[3] *Cf.* Goodnow, "Politics and Administration," ch. i.

century, Locke's views were developed and elaborated by Montesquieu, who in his "*Esprit des Lois*," established the separation of governmental powers as a fundamental principle of political science, making a third independent class of powers of the judicial functions. Blackstone expounded similar views in England, but neither of these writers maintained that any absolute and complete separation of these powers into three distinct departments of government was either desirable or possible.

In America the framers of our early constitutions accepted the doctrine of Montesquieu and recognized a certain separation of the powers of government as essential to liberty. Prior even to the adoption of the federal constitutions six of the twelve states with written constitutions at that time had thought this doctrine of sufficient importance to insert a special article or clause, distributing the powers of government, in more or less unqualified terms among the three departments.[1] When in 1818 the first constitution of Illinois embodied this principle in a separate article, eleven of the eighteen state constitutions then in force had already emphasized its importance in a similar manner.[2]

The article on the distribution of powers as embodied in the constitution of 1818 was adopted without material changes in both of the subsequent constitutions of Illinois. Hence in examining the cases involving a discussion of this article, one may regard the decisions under the earlier constitutions as equally applicable to the determination of the legal effect of the article in the present constitution; for, in the language

[1] Georgia 1777, Maryland 1776, Massachusetts 1780, New Hampshire 1776' North Carolina 1776, Virginia 1776. Thorpe, "American Charters, Constitutions and Organic Laws."

[2] Georgia 1798, Indiana 1816, Kentucky 1799, Louisiana 1812, Maryland 1776, Massachusetts 1780, Mississippi 1817, New Hampshire 1792, North Carolina 1776, Vermont 1786, Virginia 1776. Thorpe, *supra*.

of the Illinois Supreme Court: "It must be presumed that when the present constitution was adopted it was with full knowledge of the interpretation that had been placed by the court upon the language incorporated therein from the prior constitution."[1]

The earliest judicial consideration in Illinois of the meaning of the distributing article in the constitution seems to have been in the early case of *Field vs. People*,[2] in 1839, in which the court declared that this article, although expressing a fundamental principle of vital importance, was to be understood in a limited and qualified sense only, and not to mean that there shall be absolutely no connection or dependence between the departments, "for in every state there is a blending and admixture of different powers, so far as to give each department a constitutional control over the others, considered by the wisest statesmen as essential in a free government as is separation." The court goes further than this general qualification and, adopting the words of Madison,[3] declares of the article: "its true meaning in theory and practice is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many." This interpretation of the article, so broad as to be practically destructive of all significance it might have had in the minds of the framers of the constitution, was never followed; for very soon after the decision of the case in which this peculiar doctrine was announced the courts undertook in a number of instances to declare acts of one department unconstitutional as being in violation of the distributing article, though assuming to exercise some only of the powers thought to belong properly to another.

But, though this early extreme view was never followed in

[1] Sterling Gas Co. *v.* Higby, 134 Illinois, 557 (1890).

[2] 3 Illinois, 79 (1839).

[3] *Federalist*, no. xlvii.

later cases, yet from the first the Illinois courts have declared that the language of the article in question is not to be taken exactly as it stands, but must rather be regarded as implying a qualification, similar, perhaps to the one expressly inserted in the constitution of New Hampshire in which the powers of government are to be kept "as separate from and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."

Before examining the cases in which one of the departments of government was claimed to have attempted an exercise of powers properly belonging to some other, we shall refer briefly to the question of the independence of each department from the control of either of the others, which control in so far as it is not expressly sanctioned by the constitution would seem to involve a departure from the article on the distribution of powers. In the first place, under our American theory of the function of the courts in passing upon the constitutionality of the acts of the other departments, a theory firmly established in most of our state governments as well as in the federal government even before the first constitution of Illinois was framed,[1] the judiciary exercises, of course, a most effective form of control over the legislative and executive departments. In Illinois this power of the courts seems not to have been questioned, as it was in Ohio and Kentucky even after the date of the adoption of the first Illinois Constitution.[2] It must be accepted, therefore, that this form of control was not regarded as being within the spirit of the prohibition expressed in the distributing article, wherefore a discussion of the manner in which, or of the ex-

[1] Bondy, "Separation of Governmental Powers," Columbia University Studies, vol. v, p. 184.

[2] *Ibid.*, pp. 187, 188.

tent to which, this power is exercised does not properly fall within the purview of this examination.

But judicial control may also be exercised directly through the process of the courts, particularly by means of the special writs of *mandamus*, injunction, *quo warranto*, etc., as applied to officers of the government, and here the courts have given some effect to the doctrine of the independence of the several departments. The case of *People vs. Bissell*[1] established the rule that a *mandamus* will not issue to compel the performance of a duty by the chief executive under any circumstances. In this case it was sought to *mandamus* the governor to issue certain bonds which it was claimed he was legally bound to issue. The court refused the petition for a *mandamus* without considering the other questions involved in the case, on the ground that the executive department was not subject to such control by the judiciary. "Neither of the three great departments," says the court, "into which our government is by the constitution divided is subordinate to or may exercise any control over another except as provided in the constitution. We have no power to compel either of the other departments of the government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties."

The rule thus laid down in Illinois, though not the one followed in some other jurisdictions,[2] is unquestionably the most expedient in view of the practical impossibility of enforcing obedience to such a writ if issued; and the principle of the Bissell case was reaffirmed in two later Illinois

[1] 19 Illinois, 229 (1857).

[2] State *v.* Governor, 5 Ohio St., 528 (1856); Cotton *v.* Governor, 7 Jones (N. C.), 545 (1860); Magruder *v.* Governor, 25 Md., 173 (1866), *et al.*

decisions. In *People vs. Yates*,[1] the court refused an application for *mandamus* to compel the Governor to deposit with the Secretary of State a bill passed by the General Assembly and placed in his hands for consideration and which had not been returned as required by the constitution; and in the later case of *People vs. Cullom*,[2] a *mandamus* was refused which sought to compel the Governor to call an election for county judge as required by the constitution. But this independence of the executive from direct control by the courts does not extend to the protection of private rights attempted to be conferred by him contrary to law. So where the Governor is authorized to sell state realty to the highest responsible bidder, if he should attempt to sell it to one of several admittedly responsible bidders, other than the highest, the courts would review his action in passing on the rights of individual adverse claimants to the land.[3] Nor is it any interference with the powers of the executive to enjoin the making of vouchers by state house commissioners for illegal expenditures even though such vouchers required the approval of the Governor before any money could be paid out under them.[4]

The independence of the legislature from judicial interference has been recognized in a number of cases in which the courts have refused to review the discretion vested in the legislature in the performance of many of its functions. Even when the constitution has declared definitely how the legislature shall act in certain matters, as for instance in the matter of senatorial apportionment, the courts will not go back of a *bona fide* attempt to comply with the constitutional

[1] 40 Illinois, 126 (1863).

[2] 100 Illinois, 472 (1881).

[3] Webster *v.* French, 11 Illinois, 254 (1849).

[4] Littler *v.* Jayne, 124 Illinois, 123 (1888).

requirement, even though a substantial variation therefrom is offered to be shown.[1] In the case of *Whiteside County vs. Burchell*,[2] it was claimed that the legislature was bound by a trust charged by Congress on lands given to the state, to drain and reclaim them, and that it was proper for the court to enforce that trust. But the court said that even if the lands could have been regarded as charged with such a trust, it was a trust of municipal and not judicial concern, over which the power of the state is plenary and exclusive.

Certain other functions, designated by the courts as political, have been held to be without the scope of judicial interference or control in the absence of statutory authority. So the court refused to relieve against fraud, accident or mistake in elections by *mandamus* or injunction, even though no other method of contesting the election was provided.[3] Nor will a court enjoin the holding of an election, for that too is a political and not a judicial function.[4] In *Dickey vs. Reed*,[5] the court designated as such political questions those controversies where the decision of the court " must determine which of two persons shall hold an office or which of two forms of local government shall control the people of a municipality," and felt that to allow the courts to decide such questions " would largely give control of the political power of the state to the courts, a department not designed either directly or indirectly to exercise or control that power."

The independence of the judiciary as regards interference by the legislative branch of the government was asserted in

[1] People *v.* Thompson, 155 Illinois, 451 (1895); People *v.* Rose, 203 Illinois, 46 (1903).

[2] 31 Illinois, 68 (1863).

[3] Moore *v.* Hoisington, 31 Illinois 243 (1863).

[4] People *v.* Galesburg, 48 Illinois, 486 (1868).

[5] 78 Illinois, 261 (1875).

the case of *O'Neil vs. People*,[1] in a dictum to the effect that the power of the courts to punish contempt summarily is not only incident to courts of record but is not in fact susceptible of abridgment by legislative enactment. A recent assertion of freedom of the judiciary from executive control occurred in 1909 when the Supreme Court of Illinois, after invalidating three primary laws passed by the General Assembly, refused to comply with the Governor's request for a draft of a primary law which would not be open to the numerous constitutional defects that had caused the invalidating of the former laws.

Coming now to the consideration of the cases involving what was claimed to be the improper exercise by one department of powers belonging to another, we shall consider in the first place acts of the legislature which have been judicially discussed from this point of view. The general attitude of the court towards this question, as expressed in the case of *Rhinehart vs. Schuyler*,[2] was still rather more liberal than the actual subsequent decisions seemed to adopt. The court in that case quotes with approval a declaration that "the position that a legislature cannot constitutionally perform a judicial act is supported by no authority nor has it any reason in public policy or convenience," though there had already been decided some cases in which the power of the legislature to pass acts involving judicial determinations had been denied, and a number of later cases were determined in the same way. The court continues in the case above, "The constitutional division of powers is only a declaration of the general system or theory of government and was never intended to fix exact and impassable limits to each department," which is undoubtedly true, as is also the

[1] 113 Illinois, Appeals, 195 (1903).

[2] 7 Illinois, 473 (1845).

further declaration that "there are things necessary to be done in the administration of the government of a character so mixed and blended, partaking of the elements of all three divisions of power that we could not know to which to assign it." Nevertheless, we find the court unhesitatingly declaring a number of legislative acts invalid on the very ground that the legislature has encroached upon the domain reserved by the constitutional division of powers to the judiciary alone.

So the following acts were regarded as involving an unconstitutional exercise of judicial power by the legislative department:

(*a*) The ascertainment of indebtedness between two parties, and the direction of the application of property of the one to the payment of the other was held in the case of *Lane vs. Dorman*,[1] to be a judicial act that could not be performed by the legislature, and such legislative determination of the existence of debts has been held invalid in several subsequent cases.[2]

This is, of course, a very clear case of a power that properly belongs to the courts alone if the principle of the separation of powers is to be given any practical application. Of the same nature is the determination whether a widow is entitled to dower in a certain piece of land, and so a legislative act attempting to make such a determination was held invalid in the case of *Edwards vs. Pope*.[3] So also an act declaring the title to certain land, deeded by a grantor on condition, to have reverted by a breach of condition was held to be an unconstitutional exercise of judicial power.[4] On

[1] 4 Illinois, 238 (1841).

[2] Davenport *v.* Young, 16 Illinois, 548 (1855); Rozier *v.* Fagan, 46 Illinois, 404 (1868).

[3] 4 Illinois, 465 (1842).

[4] Board of Education *v.* Bakewell, 122 Illinois, 339 (1887).

the same ground it was held in the case of *Bruffet vs. Great Western Ry.*,[1] that a legislative act declaring a corporate charter to have been forfeited was an invalid attempt to exercise judicial powers.

(*b*) An attempt by the legislature to validate a tax levy which has been declared invalid by the Supreme Court was declared unconstitutional on the ground that the adjudication by the court was final and not subject to legislative revision.[2]

(*c*) A legislative declaration of what facts shall be taken as conclusive evidence of others would be an invasion of the powers of the judiciary according to the view of the court in *People vs. Rose*,[3] though it is competent for the legislature to make reasonable rules as to what facts shall constitute *prima facie* evidence.[4]

(*d*) The case of *In re Day* [5] decided that the determination of qualifications for admission to the Bar was a judicial function not subject to legislative enactment; except negatively for the protection of the state by excluding those persons through whom injurious consequences are likely to result to the inhabitants of the state. So it was held in that case that a statute providing that holders of a two-year law-school diploma should be admitted to the Bar without examination was unconstitutional. This case is somewhat peculiar, in that it undertakes to classify as strictly judicial a power which is neither expressly declared to be such by the constitution, nor which as a matter of historical practice had been previously so regarded. Furthermore, the prescribing of qualifications for the practice of all other professions is admittedly a proper legislative undertaking, and if

[1] 25 Illinois, 310 (1861).

[2] Chicago & Eastern Illinois R. R. *v.* People, 219 Illinois, 408 (1906).

[3] 207 Illinois, 352 (1904).

[4] Burbank *v.* People, 90 Illinois, 554 (1878).

[5] 181 Illinois, 73 (1899).

this departure from the ordinary rule is to be justified at all, it would seem that it could be only upon the ground of the close connection between the judiciary and the attorneys of a state, which latter are, indeed, frequently referred to as officers of the court. The opinion in the case of *In Re Day* does not, however, undertake to do more than merely lay down this rather remarkable holding.

That historical practice and express constitutional provisions are not the only basis for permitting the exercise of a power by one or the other departments of government, appears also from the opinion in the case of *Dodge vs. Cole*,[1] in which the power of a court of equity to order the sale of the realty of an insane person was upheld as a proper judicial power, though not sanctioned in either of the above two ways, there being, in the opinion of the court, no violation of the principle of separation of powers merely because the court assumed a function which in this particular aspect had not been previously exercised.

Among legislative acts objected to as an improper assumption of judicial powers but sustained by the courts as being within legislative competency are the following:

An act authorizing a guardian to sell the realty of his ward under the direction of a court of probate is not objectionable as being a judicial determination,[2] for here the legislature does not attempt to adjudicate adverse claims but merely acts in the interest of a ward by permitting his guardian to act subject to approval by the court of probate. An act authorizing the levying of a special tax by bridge commissioners for defraying the debts incurred in the erection and repair of a bridge, was held not to be objectionable as a legislative determination of indebtedness; for, while as-

[1] 97 Illinois, 338 (1881).

[2] Mason *v.* Wait, 5 Illinois, 127 (1842).

suming there may be debts, the act did not undertake the determine their nature or amount nor to whom or from whom due.[1]

Classification of lands for taxation and fixing the amount of taxes to be assessed on each class was held not to be an unconstitutional exercise of judicial powers,[2] the legislature not having designated into which class particular pieces of property should be put. The powers of the legislature over the public funds of a municipal corporation are not limited by the article on the distribution of powers as is its control over private funds. So the legislature may order a county to pay over to another county, formed out of the first, a part of a fund granted originally by the legislature to the former.[3] So also the legislature may stipulate how the surplus of taxes collected by a county and city shall be distributed between them, for the power conferred on a county to raise revenue is a political power, and its application when collected must necessarily be within the control of the legislature for political purposes.[4]

Retroactive acts affecting existing agreements are not necessarily invalid assumptions of judicial power. So an act laying down a general rule to govern all contracts made during a certain prior period, merely taking away an existing penalty for usury and directing that interest shall be allowed to the extent to which it might have been lawfully reserved, is not an improper assumption of judicial power,[5] nor is an act validating past loans by foreign corporations objectionable,[6] nor an act validating contracts made with

[1] Shaw *v.* Dennis, 10 Illinois, 405 (1849).

[2] Rhinehart *v.* Schuyler, 7 Illinois, 473 (1845).

[3] County of Richland *v.* County of Lawrence, 12 Illinois, 1 (1850).

[4] People *v.* Power, 25 Illinois, 169 (1861).

[5] Parmelee *v.* Lawrence, 48 Illinois, 331 (1868).

[6] U. S. Mortgage Co. *v.* Gross, 93 Illinois, 483 (1879).

corporations, which contracts were unenforceable because acknowledged before officers who were also stockholders in the corporation.[1] Though it was insisted that this last act was not a law but a legislative direction to the courts to decide and adjudge in a particular manner, the court held it was not the exercise of judicial power, for it did not purport to settle suits or controversies, but merely gave effect to acknowledgments in a manner under legislative control. The ground for all three of these cases is to be found in the language of Judge Cooley, quoted in the case of *U. S. Mortgage Co. vs. Gross* [2] "When such (retroactive) acts go no farther than to bind a party by a contract he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it or through neglect of some legal formality or in consequence of some ingredient in the contract forbidden by law, the question they suggest is one of policy and not of constitutional power." The general rule as stated in the same case is, that in absence of constitutional prohibition the legislature has the power, when it interferes with no vested right, to enact retroactive statutes to validate invalid contracts or to ratify or confirm any act it might lawfully have authorized in the first place.

An act restricting the defenses admissible to an application for judgment of sale upon assessments or matured instalments, by excluding those which might have been interposed in either the original proceeding for making such assessments or in the application for confirmation thereof, was held not to be a curtailment of the powers of inquiry of the court by the legislature.[3] If proper judicial inquiry is provided for, the legislature may adopt rules of this nature

[1] Steger *v.* Traveling Men's Association, 208 Illinois, 236 (1904).

[2] 93 Illinois, 483 (1879).

[3] Downey *v.* People, 205 Illinois, 230 (1903).

intended to bring litigation concerning the validity of official acts to a speedy close.

It appears, therefore, from the foregoing cases that the Illinois courts have regarded the article on the distribution of powers as prohibiting; the legislative determination among adverse claimants of property rights, whether choses in action or in possession, individual rights or corporate charters; validating a tax levy already declared invalid by the Supreme Court; making certain facts conclusive evidence of others; and determining who shall be admitted to the Bar. On the other hand, remedial acts empowering individuals to do what they desire with their own property but had not power to do; acts authorizing a sale by a guardian of his ward's realty, under the direction and sanction of a court of probate; disposition of public funds of municipal corporations for governmental purposes; classification of property and assessment of taxes by classes; retroactive acts carrying out the intention of the parties to invalid contracts; the reasonable designation of what shall be *prima facie* evidence, and the reasonable restriction of defenses in cases where proper hearing is otherwise provided; are not regarded as judicial functions denied the legislature by the requirement of separation of powers.

It should be noted that some of the cases considered above are now within the express constitutional prohibition against special legislation,[1] and would therefore no longer depend upon an application of the doctrine of separation of powers.

As regards the exercise by the legislature of powers that might be considered as belonging properly to the executive branch of the government, the early case of *Field vs. People*, *supra*, held that the power to remove the Secretary of State was not, under the constitution of 1818, to be implied as be-

[1] Constitution of Illinois, 1870, Art. iv, Sec. 22.

longing to the executive, but rested in the legislature. The creation of offices, the delegation and regulation of powers and duties of officers, and prescribing the period for which they shall be exercised are legislative functions, according to the view of the court, and rest with the legislature in absence of constitutional restraint upon their exercise. The executive pardoning power was held in the case of *Meul vs. People*[1] not to be infringed by an act providing that one-half of the fines imposed and collected under the Fish and Game Act should be paid to the informer, as the power given the Governor to grant reprieves, commutations and pardon does not confer or include the power to remit the interest of others in the fines and penalties which have become fixed and vested.

Finally, the question of what are and what are not legislative powers has arisen also, and much more frequently, indeed, in cases involving the alleged delegation of such powers to subordinate bodies not belonging wholly to either one of the two other departments of government. But as these cases raise no question of the separation of powers as between the three departments, their consideration falls properly under an examination of the judicial decisions bearing on Art. IV., § 1 of the present constitution by which the legislative power is vested in the General Assembly.

The validity of powers exercised by the executive branch of the government seems never to have been denied in Illinois on the ground of their involving a violation of the article on the distribution of powers, the early case of *Field vs. People*, *supra*, having been decided rather on the ground that as the Governor had not been directly authorized by the constitution to remove the Secretary of State, such power would not be implied, than on the ground that the power in its nature could not be exercised by the executive

[1] 198 Illinois, 258 (1902).

branch of the government.[1] An Illinois case is, indeed, sometimes cited as laying down the rule that the mayor of a city being an executive officer of the state, could not, under the constitutional separation of powers be invested with the judicial powers of a justice of the peace. But an examination of the case so cited,[2] shows that it does not stand for the proposition that the distributing article applies to mayors of cities—which would mark an important and exceptional departure from the generally prevalent view that the constitutional requirement of separation of powers refers only to the departments of the central government—but that the case really turns on another provision of the constitution of 1848, relative to the terms of justices of the peace, which made it impossible for one-year mayors to act in that capacity. This decision was followed a few years later in the case of *Beeseman vs. City of Peoria*,[3] in which the facts were similar. As these cases turn, therefore, on a special constitutional provision they cannot be taken to show an extension of the doctrine of separation of powers to local governmental agencies, which view would be neither consistent with the purpose or intent of the constitutional prohibition nor reconcilable with the actual established practice in this state, or in any other, with reference to the powers vested in local governing bodies.[4]

The extent of the constitutional restriction upon powers exercisable by the judiciary has been considered in a num-

[1] People *v.* Butler Str. Foundry Co., 201 Illinois, 236 (1903), held that requiring corporations to file an anti-trust affidavit before the Secretary of State, under penalty for failure to do so, did not invest the latter with judicial powers in violation of Article III.

[2] State *v.* Maynard, 14 Illinois, 419 (1853).

[3] 16 Illinois, 484 (1855).

[4] Bondy, *supra*, ch. xxii. Under the commission form of city government now increasingly introduced in this country especially in the West, all legislative and executive powers are united in the same authorities.

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ber of cases involving, for the most part, the validity of legislative imposition of duties upon the courts. Powers which have been considered as legislative in their nature to the extent of not being exercisable by the courts are the following:

(*a*) The changing of the boundaries of municipal corporations was held to be a legislative function not exercisable by the courts, in *City of Galesburg vs. Hawkinson*,[1] because the boundaries if fixed by the courts would still be alterable at the will of the legislature, and the proceeding therefore lacked the essence of a judicial determination, viz., that it should, so long as unreversed and not vacated, be conclusive as to the matters in controversy. But though the creation of municipal corporations and the ultimate fixing of their boundaries could not be entrusted to the courts, a board consisting of a county judge and two circuit judges may be created to designate the territory to be embraced in a proposed municipal corporation prior to submitting the question of incorporation to a vote.[2]

(*b*) The power to compel a public service corporation to charge certain specified rates for a commodity rests with the legislature and not with the courts. In the case of *People's Gas Light and Coke Co. vs. Hale*[3] the court refused to order the defendant company to charge the rates claimed by the plaintiff to be the maximum reasonable rates, on the ground that, while inquiring whether rates that have been charged and collected are reasonable or not is a judicial act, prescribing rates which shall be collected in the future is a legislative act.

(*c*) It is not competent for a court to declare that a private corporation has, by virtue of its great extent, become a

[1] 75 Illinois, 152 (1874).

[2] People *v.* Nelson, 133 Illinois, 565 (1890).

[3] 94 Illinois Appeals 406 (1900).

public service corporation. As was said in the case of the *American Live Stock Commission Co. vs. Chicago Live Stock Exchange*,[1] though there may exist facts sufficient to warrant the legislature in declaring a private corporation to have become affected with a public use and to require legal control and supervision, that power does not reside in the courts.

The constitutionality of vesting the power of appointing administrative officers in the courts, though questioned in a number of cases in Illinois, has always been upheld as not conflicting with the requirements of separation of powers. So an act giving to the circuit court the power to appoint park commissioners was upheld in two cases,[2] in one of which, *People vs. Morgan*[3] it was said that the power to appoint is by no means an executive function unless made so by the constitution or by statute, and the legislature may designate the courts as the appointing body. Similar acts authorizing county courts to appoint drainage commissioners were upheld in various Illinois cases on like grounds,[4] and the same was held with reference to an act vesting the appointment of a board of election commissioners in the county court,[5] the court resting its decision on the ground that the power to appoint officers of this kind was not characterized by the constitution as either a legislative, judicial or executive power, nor was anything therein expressed which either directly or impliedly prohibited the legislature from author-

[1] 143 Illinois, 210 (1892).

[2] People *v.* Williams, 51 Illinois, 63 (1869); People *v.* Morgan, 90 Illinois, 558 (1878).

[3] 90 Illinois, 558 (1878).

[4] Moore *v.* People, 106 Illinois, 376 (1883); Blake *v.* People, 109 Illinois, 504 (1884); Kilgour *v.* Drainage Commissioners, 111 Illinois, 342 (1884); Huston *v.* Clark, 112 Illinois, 344 (1884).

[5] People *v.* Hoffman, 116 Illinois, 587 (1886).

izing the county court to appoint such commissioners. In the later case of *Sherman vs. People*,[1] this doctrine was reaffirmed, the court adding that this jurisdiction could be conferred also under the general jurisdiction clause granting to county courts "such other jurisdiction as may be conferred by law."[2] The court in that case sustained an act making the election judges and clerks officers of the court and punishable summarily by contempt proceedings for misbehavior in office. In the same light as these powers of appointment are regarded the powers conferred on judges to take acknowledgments and to solemnize marriages.[3]

Finally, in the recent case of *Aurora vs. Schœberlein*,[4] the court held that no appeal could lie from an order of a board of fire commissioners, removing an officer under their control, to the circuit court, for the board acts executively not judicially in dismissing an officer and hence its decisions do not present a proper case for appeal to the circuit court. The court further says that the legislature could not confer such judicial power on this board as to make its decisions subject to appeal, as a judicial proceeding, to the court, though this dictum is contrary to the general rule of law elsewhere and its soundness may be doubted.

As in the case of legislative powers, so with judicial powers also, the consideration of their nature has arisen most frequently in cases involving the exercise of judicial functions by non-judicial bodies not strictly members of the two other departments of the central government. And here again, therefore, the discussion of the constitutionality of such exercise falls properly under the examination of the provision vesting the judicial power in the named organs of the judi-

[1] 210 Illinois, 552 (1904).

[2] Constitution of Illinois, 1870, Art. vi, Sec. 18.

[3] People *v.* Nelson, 133 Illinois, 565 (189c).

[4] 230 Illinois, 496 (1907).

ciary department, and has no necessary bearing on the meaning of the distributing article, for powers that are considered judicial for one purpose are not necessarily so considered for all purposes.

Summing up the cases on the powers conceded or denied the judiciary under the distributing article, it appears that courts may not (*a*) determine boundaries of municipal corporations, (*b*) declare affirmatively what rates may be charged in the future by public service corporations, (*c*) declare private corporations to have because of their growth become affected with a public interest, or (*d*) hear appeals from determinations of administrative boards. On the other hand, it is no violation of the article on the separation of powers for courts to make preliminary designations, when acting as a board, of the territory of proposed municipal corporations, or to appoint certain non-judicial officers such as park, drainage or election commissioners.

In conclusion it may be said that although the early view as announced in the case of *Field vs. People*, *supra*, by which the article on the distribution of powers would have been practically shorn of all effect, was not adhered to in later decisions, yet to-day it is true that article iii of the constitution has a significance the more remarkably small because of the emphatic language employed therein. Not only will the courts not insist on any strict separation of powers, leaning rather towards a very liberal construction of the article, but even of the above cases denying the validity of the exercise of certain powers by one or the other of the departments, the greater part could rest as well on other constitutional grounds.[1] Indeed, as regards the importance of a special article like article iii in the Illinois constitution,

[1] So the legislative determination of private rights, even when not covered by the restriction on special legislation, would undoubtedly be obnoxious to the guarantee of due process as now construed by the courts.

it seems that all of these cases would probably have been decided in the same way even in the absence of any such article, under the general idea of the separation of powers as embodied in the three clauses vesting the three powers of government in the respective departments thereof, for the federal decisions on the distribution of powers have gone as far as those in Illinois, and that too, although there is no express provision in the federal constitution corresponding to art. iii of the constitution of Illinois.

VITA

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